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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE RENT-IT CORPORATION,

Petitioner

v.

WILLIAM CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether the consumer lease transaction entered into between the parties, which is terminable at will by the lessee and includes an option to own, constitutes a "credit sale" under the Truth-In-Lending Act, 15 U.S.C. § 1601 *et seq.*, within the meaning of § 1602(g) of that Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE RENT-IT CORPORATION,

Petitioner

v.

WILLIAM CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

J. Samuel Choate, Jr., on behalf of the Rent-It Corporation, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-8a) is reported at 685 F.2d 245 (1982). The opinion

of the District Court (App. B, *infra*, 9a-12a) is reported at 511 F. Supp. 796 (S.D. Ia. 1981).

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, 1a-8a) was entered on August 12, 1982. A Petition for Rehearing was denied on September 15, 1982 (App. C, *infra*, 15a). A Motion for Stay of Mandate was denied on October 12, 1982 (App. D, *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 103(g) of the Consumer Credit Protection Act, Pub. L. 96-321, 82 Stat. 146, codified at 15 U.S.C. § 1602, provides:

> (g) The term "credit sale" refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and if it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

2. Section 3 of the Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257, codified at 15 U.S.C. § 1667 *et seq.*, provides in relevant part:

> (1) The consumer lease is defined as a contract for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family or house-

hold purposes. The definition specifically excludes a lease for agricultural, business or commercial purposes or to a governmental agency.

3. Section 105 of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, codified at 15 U.S.C. § 1604, provides in relevant part:

> (a) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

STATEMENT OF THE CASE

1. In 1968 Congress enacted the first Truth-In-Lending legislation as Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968); subsequent acts and amendments have been codified at 15 U.S.C. § 1601 *et seq.*, and are known generally as the Federal Truth-In-Lending Act. The legislation was enacted to enable consumers to compare more readily the various credit terms available to them and to avoid the uninformed use of credit. The thrust of the Act was disclosure of credit terms, of finance charges, and of the rights and liabilities in consumer transactions. Among the various types of consumer transactions contemplated by the Act, and subject to disclosure, are credit sales. Furthermore, the definition of a "credit sale" was made broad enough to include certain lease arrangements which were merely disguised sales. However, Congress was aware of the distinction

between true leases and disguised credit sales, and the definition of "credit sale" was intended to reflect that fact. H. R. Report No. 1040, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Ad. News 1960, 1980.

As originally enacted, the Truth-In-Lending Act had no application to leases (unless they amounted to disguised credit sales). But in 1976 Congress enacted the Consumer Leasing Act, P.L. 94-240, 90 Stat. 257, which provided for disclosures similar to those required with credit sales. However, the scope of the 1976 act was limited to consumer leases of more than four months' duration. As indicated in the legislative history of that act, the new act would not "apply to a shorter term convenience-type lease arrangement where the lessee is not obligated *at the outset* to a term of more than four months." S. Rep. No. 94-590, 94th Cong., 1st Sess. 4, reprinted in 1976 U.S. Code Cong. & Ad. News, 431, 434.

Therefore, neither the initial Truth-In-Lending Act nor the Consumer Leasing Act of 1976, nor any subsequent amendments to either, include within the scope of their provisions a consumer lease of less than four months' duration and which is terminable by the consumer at will.

In enacting the Truth-In-Lending legislation, Congress delegated to the Federal Reserve Board the responsibility for promulgating rules and regulations concerning the act. 15 U.S.C. § 1604. The Board was given the authority to interpret the provisions of the act in order that any questions regarding the act could be handled administratively rather than through litigation. The Supreme Court has held that the Board's interpretation of the act is entitled to substantial deference, and that the Board's interpretation of a particular provision of the TILA

should be "dispositive" in a case involving such provision. A court may not substitute its judgment for that of the Board, unless, as a condition precedent, that court examines the Board's position and finds the same to be "demonstrably irrational." A court's failure to satisfy this condition precedent to substituting its interpretation for that of the Board is reversible error. *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

2. On or about October 13, 1979, the Respondent, William Clark, entered into a contract with the Petitioner, The Rent-It Corporation, for the rental of a television set. The terms of the contract (App. E, *infra*, 17a-20a) provided that Respondent would be entitled to full use and possession of the television for one week for a rental fee of seventeen ($17) dollars; thereafter, the renter was given the right to renew the lease for successive rental periods by paying the seventeen ($17) dollar rental fee in advance each week. The conract provided that Rent-It Corporation would be obligated, at its expense, to maintain the television in good working order at all times. Additionally, the contract provided that the renter would be entitled to ownership of the television if he rented the set for seventy-eight consecutive rental periods. However, the contract also gave the renter the right to unilaterally terminate the lease at any time, without further obligation and without penalty.

After making payments for a number of weeks, the Respondent failed to make a weekly payment; the Petitioner exercised its right under the contract to terminate the contract and take possession of the television set. On or about February 1, 1980, Respondent entered into a second agreement with the Petitioner substantially similar to the agreement dated October 13, 1979. Under the terms of this new contract, the Re-

spondent made payments for the use of the television set for several months, but once again failed to make payments as required under the contract; and, on or about the 5th day of August, 1980, the Petitioner took possession of the television set once again. At this point the contract was, of course, terminated and the relationship between the parties was at an end. Thereafter, Respondent brought this action in the United States District Court for the Southern District of Iowa. The federal court's jurisdiction was invoked pursuant to § 130(e) of the Consumer Credit Protection Act, 15 U.S.C. § 1640(e), and 28 U.S.C. § 1337.

In its Complaint, the Respondent alleged violations on the part of The Rent-It Corporation of the Truth-In-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, for its failure to make certain disclosures required by that act; in particular, Respondent alleged that "this agreement, although in the form of a lease, constituted a credit sale, within the meaning of the Truth-In-Lending Act, 15 U.S.C. § 1602(g)." In addition, the Respondent alleged certain violations of the Iowa Consumer Credit Code, Chap. 537, Code of Iowa. The Respondent brought these state claims in the District Court on the basis of that court's pendent jurisdiction.

On motion by the Defendant, The Rent-It Corporation, the United States District Court dismissed the complaint for failure to state a claim under the Truth-In-Lending Act and the Court further dismissed the pendent state claims, citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

On appeal to the Eighth Circuit Court of Appeals, the District Court was reversed; the Eighth Circuit held that the District Court's analysis of the Truth-In-Lending Act was unduly restrictive, and that the Plaintiff

should have been allowed to introduce evidence of the "totality of the circumstances surrounding [the] transaction" and the parties' "contractual expectations." 685 F.2d 245, 247 (1982).

The Petitioner, The Rent-It Corporation, filed a Petition for Rehearing in the Eighth Circuit on September 5, 1982. That petition (App. F, *infra*, 21a-29a) pointed out to the Eighth Circuit, *inter alia*, that its decision was in conflict with the Federal Reserve Board's interpretation of the act, that the court had not found the Board's interpretation to be "demonstrably irrational," and that, therefore, the Eighth Circuit was ignoring this Court's directive in *Milhollin* that the Board's interpretation of the TILA be followed. The petition for rehearing was denied on September 15, 1982.

REASONS FOR GRANTING THE PETITION

This case presents an issue which is being heavily litigated in the federal and state courts around the country, and the Petitioner respectfully submits that there are three reasons why this Court should grant a Writ of Certiorari in this case:

(1) The Eighth Circuit's interpretation of the term "credit sale" as defined by the Truth-In-Lending Act, is in direct and irreconcilable conflict with the Federal Reserve Board's interpretation; further, the Eighth Circuit did not find that the Board's interpretation was "demonstrably irrational." The Eighth Circuit thus totally ignored the Supreme Court's admonition in *Milhollin* that the Board's interpretation of the Act be dispositive in such cases. (2) There is a growing tendency among courts to disregard the authority of the Federal Reserve Board in its interpretation of the Truth-In-Lending Act in spite of the Supreme Court's directive

in *Milhollin* that the Board's interpretation be followed. (3) The Eighth Circuit has violated well-known principles of contract law by seeking to examine the subjective intent of the parties rather than the unambiguous and objective manifestations in the written agreement.

As stated by the Court of Appeals, the sole issue[1] in this case is whether the rental agreement with "option to purchase" executed by Clark and the Rent-It Corporation constituted a "credit sale" under the Truth-In-Lending Act within the meaning of 15 U.S.C. § 1602(g). As noted above, the rental agreement granted the lessee the unrestricted right to terminate the lease at any time, without further obligation and without penalty. This type of lease is known in the rental industry as a "terminable consumer lease."

In enacting the Truth-In-Lending Act, Congress was aware that because of the complexity and variety of consumer transactions, no single statute could provide the needed regulation in the area; Congress therefore delegated substantial authority to the Federal Reserve Board for the promulgation of rules and regulations under that act:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter,

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[1] The applicability of the Consumer Leasing Act of 1976, 15 U.S.C. § 1667 *et seq.*, was not an issue raised by the Plaintiff below. In point of fact, the lease contract at issue here is not covered by the 1976 Act, which covers only leases exceeding four months in duration.

> to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604(a).

Charged with the responsibility of interpreting the Truth-In-Lending Act, the Federal Reserve Board has issued a comprehensive set of regulations for the enforcement of that act, *i.e.*, Regulation Z, 12 C.F.R. § 226 *et seq.* Until recently, that regulation defined a "credit sale" in terms identical to the act itself; by simply restating the definition, the Board failed to clarify the arguably imprecise language of the act. However, in a number of written opinions, the Federal Reserve Board has uniformly and consistently held that terminable consumer leases do not constitute credit sales within the meaning of the Truth-In-Lending Act. *See* Federal Reserve Board Staff Opinions No. 701, July 31, 1973; No. 750, January 11, 1974; No. 761, March 12, 1974; No. 783, April 1, 1974, 5 CCH, CCG ¶ 31,105; No. 871, February 28, 1975, 5 CCH, CCG ¶ 31,202; No. 1010, February 25, 1976, 5 CCH, CCG ¶ 31,350; No. 1192, June 15, 1977, 5 CCH, CCG ¶ 31,623; and No. 1259, October 20, 1977.

The Board's interpretation of the term "credit sale" as applied to terminable consumer leases has focused on the requirement that the consumers have "contracted to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property or services involved." The Board noted that this requirement is not met when "the lease agreement may be cancelled at any time . . . , at no cost or penalty to the consumer." FRB Op. No. 750, January 11, 1974. The Board thus found that this right to terminate the lease on the part of the lessee, put such transactions beyond the scope of the Truth-In-Lending Act.

The Federal Reserve Board's treatment of these terminable consumer leases has been unwavering in its consistency. The Board holds that these terminable leases are not covered by the Truth-In-Lending Act (see FRB opinions cited above). This fact has been made absolutely clear by the latest version of Regulation Z, which came into effect on April 1, 1981, and became mandatory as of October 1, 1982. That regulation now defines a credit sale as follows:

> (16) "Credit sale" means a sale in which the seller is a creditor. The term includes a bailment or lease (*unless terminable without penalty at any time by the consumer*) under which the consumer: (i) agrees to pay as compensation for use, a sum substantially equivalent to or in excess of, the total value of the property and services involved; and (ii) will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

12 C.F.R. § 226.2(16) (emphasis added).

The only change in the definition is the parenthetical exclusion of terminable consumer leases. This latest definition of a credit sale under Regulation Z would have been *dispositive* of this case had it been in effect on the date that the parties in this case entered into the transaction. Even so, this revised definition of a "credit sale" does *not* represent a departure from the earlier position of the Federal Reserve Board. The Board has held consistently and uniformly that terminable consumer leases are not covered by the Truth-In-Lending Act; and, the Petitioner had a right to rely on those interpretations by the Board. 15 U.S.C. § 1640(f). This latest version of Regulation Z merely confirms what the Board had stated many times before.

In light of the Board's clear position on the inapplicability of the Truth-In-Lending Act to terminable consumer leases, the only question that remains is whether the Eighth Circuit was obliged to accept the Board's interpretation. The answer was given by this Court in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

In *Milhollin* this Court explicitly upheld the Board's authority to interpret the Truth-In-Lending Act. Furthermore, this Court unambiguously articulated the weight to be given the opinions of the staff of the Federal Reserve Board by courts construing the TILA:

> *Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons.*
>
> The Court has often repeated the general proposition that considerable respect is due " 'the interpretation given [a] statute by the officer or agency charged with its administration.' " *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 57 L. Ed. 2d 337, 98 S. Ct. 2441 (1978), quoting *Udall v. Tallman*, 380 U.S. 1, 16, 43 L. Ed. 2d 616, 85 S. Ct. 792 (1965); see, e.g., *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, 6 L. Ed. 2d 924, 81 S. Ct. 1529 (1961). An agency's construction of its own regulations has been regarded as especially due that respect. See *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945). This traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in "setting [the statutory] machinery in motion . . . ." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 77 L. Ed. 796, 53 S. Ct. 350 (1933). As we emphasized in *Mourning v. Family Publications Service*,

> 411 U.S. 356, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973), Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder.
>
> Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. *Id.* at 565, 566.

(Emphasis supplied.)

It is difficult to imagine a more direct statement to the courts, but somehow the Eighth Circuit failed to get the message.

The *Milhollin* decision makes clear that the Eighth Circuit was obliged to follow the Board's interpretation of the meaning of the term "credit sale," unless, as a condition precedent to holding otherwise, the Court found the Board's position to be "demonstrably irrational."

The Eighth Circuit did not find the Board's interpretation to be "demonstrably irrational." By failing to even *consider* the Board's position, and by substituting its judgment for that of the Board, the Court of Appeals committed reversible error.

The Eighth Circuit's holding in the case at bar not only ignores the clear authority of the Federal Reserve Board, it conflicts with the majority of District Court cases holding that terminable consumer leases do not constitute "credit sales." *Stewart v. REMCO Enterprises, Inc.*, 487 F. Supp. 361 (1980); *Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127 (1978); *Lemay v. Stromans, Inc.*, 510 F. Supp. 921 (1981); *Dodson v. REMCO Enterprises, Inc.*, 504 F. Supp. 540 (1980); and

Clark v. Rent-It Corporation, 511 F. Supp. 796 (1981); *contra, Waldron v. Best T.V. & Stereo Rentals, Inc.*, 485 F. Supp. 718 (1979); and, *Davis v. Colonial Securities Corp.*, 541 F. Supp. 302 (1982). Only two circuit courts have dealt with the issue, one of which was the Eighth Circuit in the case at bar. The other was *Smith v. ABC Rental Systems of New Orleans, Inc.*, 618 F.2d 397 (5th Cir. 1978), which issued a per curiam opinion as follows:

> The District Court correctly held that the transaction which forms the basis of Plaintiff-Appellant's claim in this action was not covered by the Consumer Leasing Act of 1976 (15 U.S.C. § 1667) and § 226.15 of Regulation Z (12 C.F.R. § 226.15), or the Truth-In-Lending Act (15 U.S.C. § 1601 et seq.) and § 226.8 of Regulation Z (12 C.F.R. § 226.8). The Judgment appealed from is AFFIRMED.

The Eighth Circuit preferred to rely on the authority of *Waldron v. Best T.V. & Stereo Rentals, Inc.*, 485 F. Supp. 718 (D. Md. 1979). In *Waldron, supra,* the Court likewise made no reference to the Federal Reserve Board's interpretation of the Act, but simply stated that "despite the presence of the termination clauses, the agreement was essentially a contract for the credit sale of the TV set to Plaintiff." *Id.* at 719. The failure of the District Court in *Waldron* to follow the interpretations of the Federal Reserve Board was explainable in part because that decision was rendered before the Supreme Court decided *Milhollin.*

The only other reported District Court case holding terminable consumer leases to be "credit sales" within the meaning of the Truth-In-Lending Act is *Davis v. Colonial Securities Corp.*, 541 F. Supp. 302 (1982). In an opinion remarkable only for its misstatement of the law, the District Court for the Eastern District of Penn-

sylvania declined to follow the conclusion of the FRB Staff Opinion Letters, on the theory that "unofficial opinions of the Federal Reserve Board are not necessarily binding upon the Courts." *Id.* at 305. In this respect, *Davis* represents a rather disturbing departure from the Supreme Court's holding in *Milhollin* that Federal Reserve Board Staff Opinions are entitled to substantial deference. The *Davis* Court has made a distinction between official and unofficial opinions of the Federal Reserve Board; this is a distinction which the Supreme Court did not make in *Milhollin*. In addition to the apparent disregard of *Milhollin* by the Eighth Circuit, the *Davis* case appears to represent the beginning of an erosion of this Court's holding in *Milhollin* by the District Courts in the form of this purely semantic and totally nonsubstantive distinction. However, even if we were to give the *Davis* Court's[2] distinction full validity, that Court still chose to ignore the most official statement that the Board can make in the form of the revision of Regulation Z, which, at the time *Davis* was decided, specifically excluded terminable consumer leases from the definition of "credit sale." 12 C.F.R. § 226.2(16). If the *Davis* Court was indeed looking for an official Board statement with regard to the definition of "credit sale," it apparently "did not see the forest for the trees."

Although *Davis* was not relied upon by the Eighth Circuit below, the Petitioner wishes to make the Supreme

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[2] The *Davis* Court went on to say that "the Board's position narrowly defines the term 'credit sale' and does not recognize that the act should be construed liberally. . . ." *Id.* at 305. What the *Davis* Court did not recognize is that, however the Act is to be construed, it is to be construed in the first instance by the Federal Reserve Board and its staff.

Court aware of what appears to be a growing tendency among the courts to disregard the Federal Reserve Board and its interpretations of the TILA. By distinguishing between official and unofficial opinions of the FRB, the *Davis* Court is essentially "splitting hairs"; this is the same sort of judicial disrespect for the Federal Reserve Board of which the Ninth Circuit was found guilty in *Milhollin*, and this Court should put a stop to such efforts to undermine *Milhollin*.

Another objectionable feature of the Eighth Circuit's opinion below was its treatment of the contractual relationship between the parties. Unimpressed by the distinct characteristics of a terminable consumer lease, the Court of Appeals refused to hold as a matter of law that such leases were not "credit sales" within the meaning of the Truth-In-Lending Act. 685 F.2d at 248. Instead, the Court of Appeals decided that a trial court should hear evidence concerning the "totality of the circumstances surrounding [the] transactions" and the parties' "contractual expectations." *Id.* at 248. Thus the court imagined that there might be some set of facts which would magically change a terminable consumer lease into a credit sale despite the unambiguous wording of the parties' rights in the agreement.

While the Court of Appeals has authority to interpret contracts in some cases, it does not have the authority to rewrite them. And where, as here, the contract is clear and unambiguous in its terms, the court may not inquire into the subjective expectations of the parties. A terminable consumer lease, such as the one entered into by the Respondent in this case, is a legitimate business method of making available to consumers the use and servicing of consumer products. The fact that such transactions fall outside of the scope of the Truth-

In-Lending Act does not give the Court of Appeals the right to rewrite both the contract and the Truth-In-Lending Act.

The Federal Reserve Board has repeatedly held that terminable consumer leases are not subject to the disclosure requirements of the TILA. On its face, the contract clearly and unamibguously gives the renter the unilateral right to terminate this contract at any time without further obligation and without penalty. Therefore, as a matter of law, the Truth-In-Lending Act has no application to this transaction and the Eighth Circuit erred in holding otherwise.

In summary, the decision of the Eighth Circuit Court of Appeals below goes against the overwhelming authority on the issue presented in this case, is in irreconcilable conflict with the decisions of the Federal Reserve Board and its interpretation of the Truth-In-Lending Act, and totally disregards this Court's holding in *Ford Motor Credit Company v. Milhollin, supra.* The court below has attempted to usurp Congressional authority by ignoring the opinion of the administrative body charged by Congress with the responsibilty of interpreting the act and, instead, the Court has tried to legislate on its own. This has all been done in the face of this Court's explicit direction to the contrary. If the Eighth Circuit's opinion below is not reviewed, the precedential value of *Milhollin* is seriously damaged.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Submitted: August 9, 1982
Filed: August 13, 1982

Before *Heaney* and *McMillian*, Circuit Judges, and *Henley*, Senior Circuit Judge.

HEANEY, Circuit Judge.

William Clark appeals from the district court's April 24, 1981, order dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), his lawsuit for damages under the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (TILA).[1] *Clark*

[1] Clark also asserted several pendent state law claims which the district court dismissed pursuant to Fed. R. Civ. P. 12(b)(1) after dismissing his Truth in Lending Act claims. *Clark v. Rent-It Corporation*, 511 F. Supp. 796, 799 (S.D. Ia. 1981).

v. Rent-It Corporation, 511 F. Supp. 796 (S.D. Ia. 1981). Because we conclude that the district court erred in dismissing Clark's suit solely on the pleadings before any evidence was presented, we reverse its judgment and remand for further proceedings.

In November, 1979, and again in February, 1980, Clark entered into contracts with Rent-It Corporation to "rent" a television set for seventeen dollars per week. In both instances, the parties executed standard form contracts that were supplied by Rent-It and that provided at the top in bold face type: "**THIS IS A RENTAL AGREEMENT WITH OPTION TO PURCHASE.**" Under the agreements, Clark was entitled to become the owner of the television if he paid the weekly fee for seventy-eight consecutive weeks. The sole issue presented here is whether the "Rental Agreement with Option to Purchase" executed by Clark and Rent-It constituted a "credit sale" under the TILA within the meaning of 15 U.S.C. § 602(g).[2] If the "Rental Agreement with Option to Purchase" constituted a "credit sale" under the TILA, Rent-It was required by 15 U.S.C. § 1638 to make certain disclosures to Clark. If, on the other hand, the agreement was not such a "credit sale," the TILA was not applicable, and Clark's complaint would not state a claim for relief under the federal statutory scheme. Clark has

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[2] 15 U.S.C. § 1602(g) provides:

> The term "credit sale" refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contracts.

filed an appellate brief in this Court, but Rent-It has not despite repeated requests by our Clerk's office.

The case authority on the issue presented here is limited to a few decisions by district courts, which have split on the question.[3] The court below rejected the decisions holding that agreements like the one involved here were, or might be shown to be, "credit sales" because they "gloss[ed] over the limited obligation of the lessee." *Clark v. Rent-It Corporation, supra,* 511 F. Supp. at 798. It reasoned that because the "Rental Agreement with Option to Purchase" specifically obligated Clark to "rent" the television for "only one

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[3] The decisions which have held that agreements similar to the one involved in this case are *not* "credit sales" covered by the TILA include: *Lemay v. Stroman's, Inc.*, 510 F. Supp. 921 (E.D. Ark. 1981); *Dodson v. Remco Enterprises, Inc.*, 504 F. Supp. 540 (E.D. Va. 1980); *Stewart v. Remco Enterprises, Inc.*, 487 F. Supp. 361 (D. Neb. 1980); *Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127 (E.D. La. 1978), *aff'd*, 618 F.2d 397 (5th Cir. 1980) (brief per curiam opinion without analysis); and, apparently, several other unpublished district court decisions which have not been presented to this Court.

In contrast, the United States District Court for the District of Maryland held, in denying a defendant's motion to dismiss, that a "Rental Agreement With Option to Purchase" much like the agreement involved in this case did constitute a "credit sale" under the TILA. *Waldron v. Best T.V. and Stereo Rentals, Inc.*, 485 F. Supp. 718 (D. Md. 1979). In addition, Clark appended three unpublished district court opinions in his brief in this Court which concluded that similar agreements might well constitute "credit sales" under the TILA. Therefore, those courts denied various defendants' pretrial motions to dismiss or for summary judgment. *Burks v. Curtis Mathes Centers, Inc.*, No. 4-79-429 (D. Minn., Nov. 14, 1980); *Jones v. Action TV Rentals, Inc.*, No. 79-1535 (E.D. Pa., June 30, 1980); *Johnson v. McNamara*, No. H-78-238 (D. Conn., April 13, 1979).

week,"[4] his obligations as a "weekly lessee" were much less than those of a purchase under a conditional sales contract. Moreover, it rejected Clark's contention that under Iowa Code § 554.1201(37), the "Rental Agreement with Option to Purchase," was a security instrument, that is a conditional sales contract, rather than a true lease.[5] Finally, it concluded that discovery and

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[4] The relevant provisions of the "Rental Agreement with Option to Purchase" provide:

> TITLE AND OPTION: Title remains at all times in the owner during the time which this rental option agreement is in effect. If renter chooses to rent this equipment for 78 consecutive (in a row) weeks at the weekly rental charge shown above, and fulfills all other terms and conditions of this agreement, title to the equipment shall, at the end of 78 weeks, be transferred to renter in the form of a paid receipt. The renter receives use and possession of the property for successive one week terms so long as weekly rental payments are made on or before the date due and renter complies fully with all agreements and conditions hereof and unless this agreement is terminated as provided herein.
>
> TERMINATION BY RENTER: Renter at its option may at any time terminate this agreement by return of the property to owner in its present condition fair wear and tear excepted and by payment of all rental payments due on or during the week of termination. Renter is *required* to rent this equipment for only one week.

Clark v. Rent-It Corporation, supra, 511 F. Supp. at 797 (emphasis in original).

[5] The Uniform Commercial Code (UCC), codified in Iowa Code § 554.1201(37), provides in part:

> Whether a lease is intended as security is to be determined by the facts of each case; however, * * * an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

[footnote continued]

further proceedings were not necessary prior to adjudication of the issue. *Id.* at 798–799. Accordingly, it held that as a matter of law, the agreement between Clark and Rent-It did not constitute a "credit sale" as defined in 15 U.S.C. § 1602(g). It stated: "[a] lease giving an option to acquire title is a disguised 'credit sale' * * * only if the lessee is *obligated* to pay rent in an aggregate sum equal to or in excess of the value of the rented property." *Id.* at 799 (emphasis included). Clark filed a timely notice of appeal.

Clark essentially argues in this Court that: (1) the district court erred in denying him an opportunity to offer evidence that would prove facts entitling him to relief under the TILA; and (2) the district court's analysis of the "Rental Agreement with Option to Purchase," the TILA, and the relevant case authority was unduly restrictive. We agree with both contentions.

Preliminarily, we are mindful of the general legal principles applicable to this case. The district court "is

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Some courts have held that under this provision of the UCC, "leases" which give the "lessee" both an option to terminate at will and an option to purchase at the end of the "lease" period are conditional sales contracts rather than rental agreements. *See, e.g., Waldron v. Best T.V. and Stereo Rentals, Inc., supra,* 485 F. Supp. at 819–820. *See also* White and Summers, Uniform Commercial Code (2d ed. 1980), §§ 22-3, 22-4, at 880–888. The district court here, however, concluded that Iowa Code § 554.1201(37) did not aid Clark because he "could not become the owner of the TV set 'upon compliance with the terms of the lease.'" *Clark v. Rent-It Corporation, supra,* 511 F. Supp. at 798. That observation ignores the fact that Clark *could,* and was indeed *entitled* to become the owner of the television set if he complied with the terms of the "Rental Agreement with Option to Purchase"—that is, if he paid the seventeen dollars weekly "rental" fee for seventy-eight consecutive weeks. *See* slip op., *supra,* at n.4. The district court on remand should reconsider the applicability of Iowa Code § 554.1201(37) in this case.

constrained by a stringent standard in passing on a Rule 12(b)(6) motion to dismiss." *Fusco v. Xerox Corp.*, No. 81-2133 (8th Cir., April 28, 1982), slip op. at 3. This Court in *Fusco* explained:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the [face] of the complaint that there is some insuperable bar to relief [citations omitted]." *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

Id.

The TILA "is remedial in nature, and the substance rather than the form of credit transactions should be examined in cases arising under it." *Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 44, 46 (8th Cir. 1976). Moreover, in interpreting agreements possibly covered by the TILA, "the practices of the trade, the course of dealing of the parties, and the intention of the parties in addition to specific contractual obligations" must be considered. *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 90 (8th Cir. 1976). The legislative history of the TILA shows that Congress was aware that "some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress

attempted to establish," *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973), and that it intended to include within the statutory definition of "credit sales" purported leases "if they are, in essence, disguised sale arrangements." 1968 U.S. Code Cong. & Ad. News 1962, 1980.

In light of the foregoing legal principles, we hold that the district court committed reversible error by dismissing plaintiff's complaint. Moreover, we disagree with the district court's observation that evidence reflecting that Rent-It "enters into numerous similar transactions and that most customers keep [their] TV set[s] for 78 weeks and exercise the option to become its owner" is "irrelevant." *Clark v. Rent-It Corporation, supra,* 511 F. Supp. at 798-799. Such evidence is clearly relevant to Clark's explanation of the totality of the circumstances surrounding his transactions with Rent-It, and the parties' contractual expectations. *See* the decisions in note 3, paragraph 2, slip op., *supra,* at 3.

Clark argues that if given the opportunity he would attempt to show that: (1) when he signed the contracts with Rent-It, he was led to believe, and did in fact believe, that he was purchasing the television set; (2) Rent-It's business is aimed at low income customers who cannot obtain loans and who cannot afford to pay cash but who desire to purchase television sets; and (3) Rent-It entered into numerous transactions in which the "lessee" of its property eventually became owners of such property. Clark should be given an opportunity to substantiate these claims, and to establish that the "Rental Agreement with Option to Purchase" was in fact a disguised credit sale.

Accordingly, the district court's April 24, 1981, order is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CIVIL DIVISION

Civ. No. 80-516-B

William Clark,
Plaintiff,

v.

The Rent-It Corporation,
Defendant.

April 24, 1981

Susan B. Brammer, Des Moines, Iowa, for plaintiff.
Michael Hyzer, Des Moines, Iowa, for defendant.

VIETOR, District Judge.

Plaintiff sues under the Truth-in-Lending Act, 15 U.S.C. § 1601 et seq., to recover statutory damages for defendant's failure to comply with the disclosure requirements of the Act. Plaintiff also asserts state pendent claims under the Iowa Consumer Credit Code, Iowa Code § 537.1101 et seq. Defendant has moved to dismiss the federal claim for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), and the pendent state claims for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1).

The complaint alleges the following: On October 13, 1979, plaintiff and defendant entered into a written agreement under which plaintiff rented a television set from defendant for a rental charge of $17 per week. The pertinent portions of the agreement provide:

> TITLE AND OPTION: Title remains at all times in the owner during the time which this rental option agreement is in effect. If renter chooses to rent this equipment for 78 consecutive (in a row) weeks at the weekly rental charge shown above, and fulfills all other terms and conditions of this agreement, title to the equipment shall, at the end of 78 weeks, be transferred to renter in the form of a paid receipt. The renter receives use and possession of the property for successive one week terms so long as weekly rental payments are made on or before the date due and renter complies fully with all agreements and conditions hereof and unless this agreement is terminated as provided herein.
>
> TERMINATION BY RENTER: Renter at its option may at any time terminate this agreement by return of the property to owner in its present condition fair wear and tear excepted and by payment of all rental payments due on or during the week of termination. Render is *required* to rent this equipment for only one week.

Plaintiff rented the TV set until January 24, 1980, when defendant repossessed it. On February 1, 1980, the parties re-established their arrangement by re-delivery of the TV set to plaintiff and execution of a new agreement identical to the original. On August 5, 1980, defendant again repossessed the TV set.[1] Plaintiff's efforts to

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[1] Plaintiff does not allege defendant's reason for either repossession, but the agreement provides for termination of the agreement by defendant in the event of nonpayment of rent or other breach by plaintiff.

get defendant to return the TV set were unsuccessful. Defendant considered the agreement terminated.

Plaintiff contends that the agreement is really a sales agreement disguised as a lease agreement and that the transaction is a "credit sale" within the meaning of 15 U.S.C. § 1602(g), which provides:

> The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

If the transaction is a "credit sale" defendant was required by 15 U.S.C. § 1638 to make certain disclosures to the plaintiff. If the transaction is not a "credit sale," plaintiff has failed to state a claim for relief under the Truth-in-Lending Act.

Case authority on the issue is limited to a few district court opinions, most of them unpublished. In *Stewart v. Remco Enterprises, Inc.*, 487 F. Supp. 361 (D. Neb. 1980), Judge Denney sustained defendant's motion for summary judgment in a similar action holding that the agreement did not fall within the meaning of the term "credit sale" as defined in section 1602(g) because the plaintiff was *required* to pay only one week's rent, a sum less than the value of the TV set. *See Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127, 129 (E.D. La. 1978). *Contra, Waldron v. Best T.V. & Stereo Rentals, Inc.*, 485 F. Supp. 718 (D. Md. 1979).

Unpublished district court opinions provided to the court by plaintiff's counsel and citations in *Stewart v. Remco Enterprises, Inc., supra,* 487 F. Supp. at 363, and *Waldron v. Best T.V. & Stereo Rentals, Inc., supra,* 485 F. Supp. at 719 n.2, of other unpublished district court opinions reveal that the courts that have confronted the issue have split rather evenly.

Plaintiff relies on *Waldron v. Best T.V. & Stereo Rentals, Inc., supra,* and unpublished decisions reaching the same result as *Waldron,* which take the view that an agreement like that involved in this case is in substance a conditional sale contract. I do not find this view persuasive because it glosses over the limited obligation of the lessee. Under these agreements the lessee is obligated to rent the chattel for only one week. He is not obligated to rent it for such a length of time that the total rental payments will equal or exceed the value of the rented chattel. On the other hand, a purchaser under a conditional sale contract, although he pays by weekly or monthly installments and is subject to forfeiture of the chattel if he defaults, is obligated to pay the *full* purchase price and is therefore obligated, in the event of default and forfeiture, to pay any deficiency remaining after repossession and resale of the chattel. Furthermore, the seller may choose to invoke other remedies. *See* Part V of Article 9, Uniform Commercial Code—Secured Transactions, Ch. 554 of the Code of Iowa. The difference between the commitments of the weekly lessee and the conditional sale purchaser is substantial.

Plaintiff, correctly pointing out the guidance to be received on this issue from the commercial law of the state which governs the contract, cites the following definition language in the Uniform Commercial Code, Iowa Code § 554.1201(37):

> Whether a lease is intended as security is to be determined by the facts of each case; however, * * * an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

I find no support for plaintiff's position in this statutory definition because plaintiff could not become the owner of the TV set "upon compliance with the terms of the lease." He complied with the terms of the lease when he paid $17 rental for one week's possession of the TV set, but he could not become its owner unless he elected to keep renting it for each of the succeeding 77 weeks.

Plaintiff suggests that discovery is necessary before the issue presented can be adjudicated and therefore adjudication cannot be made on a motion to dismiss. He predicts that discovery would show that defendant enters into numerous similar transactions and that most customers keep the TV set for 78 weeks and exercise the option to become its owner.[2] If such evidence were discovered, it would be irrelevant. What most customers choose to do would not affect plaintiff's contractual obligation to do no more than rent the TV set for one week at $17. The issue presented is a legal one, not a factual one, and is properly determinable as a matter of law in response to defendant's motion to dismiss.

It is this court's conclusion that the agreement between plaintiff and defendant does not constitute a "credit

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[2] Such anticipated facts would be substantially different from the facts in *Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127 (E.D. La. 1978), cited in the body of this ruling. In *Smith* defendant's manager testified that 73% of defendant's customers kept their TV sets less than four months and that most of these kept their set one month or less. *Id.* at 128.

sale" as defined in section 1602(g). A lease giving an option to acquire title is a disguised "credit sale" within the meaning of the statute only if the lessee is *obligated* to pay rent in an aggregate sum equal to or in excess of the value of the rented property.

Defendant's motion to dismiss must be sustained as to plaintiff's federal claim, Count I of the complaint, and because the federal claim is being dismissed it is appropriate to also dismiss the pendent state claims, Counts II and III. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966).

Defendant's motion to dismiss is sustained and the clerk is directed to enter judgment in favor of the defendant and dismiss plaintiff's complaint.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1982

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

September 15, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1982

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In accordance with the Court's directions, appellee's motion to recall mandate and stay mandate pending certiorari proceedings is denied.

October 12, 1982

APPENDIX E

THE RENT-IT CORP.
2211 Hickman Rd., Suite 1A
Des Moines, Iowa 50310

Renter	Clark, William & Delores		
Residence Address	2413 Bennet Des Moines, Ia. 50310		
Phone	np		
Item	C.C.	Brand	GE
Model	YM9408WD	Serial	5R4A12434
Inventory Stock #	240268		

Rental rate per week (includes state and local taxes if applicable) $17.00

In home pick-up charge $10.00

Processing fee none

Commencement date of rental term Friday, 2-1-80

THIS IS A RENTAL AGREEMENT WITH OPTION TO PURCHASE

The undersigned, herein called "renter", whether one or more, do jointly and severally hereby rent from the rental company, herein called "owner", the above described personal property, herein called "property", at the rental rate set forth above, payable weekly in advance for a week to week term beginning on the commencement date stated above.

THIS IS A WEEK-TO-WEEK RENTAL AGREEMENT WITH AN OPTION TO PURCHASE

Title and Option: Title remains at all times in the owner during the time which this rental option agreement is in effect. If renter chooses to rent this equipment for

78 consecutive (in a row) weeks at the weekly rental charge shown above, and fulfills all other terms and conditions of this agreement, title to the equipment shall at the end of 78 weeks be transferred to renter in the form of a paid receipt. The renter receives use and possession of the property for successive one week terms so long as weekly rental payments are made on or before the date due and renter complies fully with all agreements and conditions hereof and unless this agreement is terminated as provided herein.

Processing Fee: In addition to the other amounts set forth herein, a one time charge of (none) is payable along with and in addition to the first rental payment. This fee is charged for the processing and preparation of the rental order and customer file.

In Home Pick-up Charge: This agreement does *not* bear interest and there is *no* default or late charge. *However,* if the renter wishes to rent the equipment described above for more than one week, the payment for the second week is due on the same day of the following week and likewise as to each additional week the renter wishes to rent the equipment. If the renter does not make his payment when due and the owner sends an employee to the place where the equipment is located to pick up the equipment at that time and/or collect the money due, *then and only then* shall the owner be entitled to receive $10.00 for making the trip to the customer's home or other place where the equipment is located. This charge is shown above as an in home pick-up charge.

Termination by Renter: Renter at its option may at any time terminate this agreement by return of the property to owner in its present condition fair wear and tear excepted and by payment of all rental payments due on or during the week of termination. Renter is *required* to rent this equipment for only one week.

Termination by Owner: This agreement shall at the option of the owner and without notice terminate upon the failure of renter to make every rental payment required herein on the date due or by breach by the renter of any agreement, condition or representation, all of which are agreed to be material. On termination renter shall immediately return the property to owner in its present condition, fair wear and tear excepted, and renter shall remain liable for all payments hereunder to the date of termination and for the performance of all agreements and conditions hereof.

Location of Property: Renter warrants and agrees that it will keep said property in its possession at the residence address above and will not remove said property from said address without agreement in writing executed by the owner. If renter moves said property without securing prior agreement in writing from owner, this agreement shall be thereby breached, giving the owner the right of immediate possession and renter shall be liable for prosecution under applicable state laws.

Damages: Renter is fully responsible for the loss, theft or destruction of said property from all causes whatever and agrees to pay to the owner the fair market value of the property in such event. In the event of damage and/or partial destruction from any cause whatever, renter agrees to pay to the owner a reasonable cost of repair to said property.

Assignment: This agreement may be sold, transferred and assigned by owner without restriction. Renter has no right to assign, sublease or transfer his rights herein without the written consent of owner.

Maintenance: The owner does hereby agree to maintain the personal property in good working order and any and all maintenance or repairs to the property of

the owner rented hereunder must be performed by the owner and the owner will not be responsible for costs of any repairs done at the request of the renter by others.

Owner's Right to Enter and Take Possession: The owner and its agents upon the termination of this agreement are specifically authorized to peaceably enter upon any premises where the property may be found and renter agrees to allow owner to take possession of and remove the property without liability, and owner and its agents are hereby released and discharged from any claim or cause of action in or relating to entry and taking possession in accordance with this agreement and renter agrees to indemnify owner and its agents for all costs, expenses and damages occurring directly or indirectly from or related to the taking possession and the removal of said property.

Renter has no right to sell, mortgage, pawn, pledge, encumber or dispose of said property or to move said property from the residence address listed above. To do so is a breach of this agreement and renter shall be liable under applicable state law.

TIME IS OF THE ESSENCE OF THIS AGREEMENT.

This rental agreement may be modified, varied, altered, or extended, or the agreements or conditions hereof waived, only by agreement in writing executed by the owner. Renter acknowledges receipt of said property in satisfactory operating condition.

I HAVE READ AND UNDERSTOOD THE ABOVE RENTAL AGREEMENT AND A COMPLETED COPY OF THIS AGREEMENT HAS BEEN DELIVERED TO ME.

Renter /s/ William Clark

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

PETITION FOR REHEARING

COMES NOW the Appellee and moves this Court pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure for a rehearing of its judgment filed August 13, 1982 in the above stated matter.

It is unfortunate that the Appellee, the Rent-It Corporation (Rent-It), did not pursue the defense of this appeal by appearance of counsel or brief. Counsel filing this petition for rehearing has been engaged by the trade association representing the rapidly developing "Rent-To-Own" industry, with the concurrence of counsel for Rent-It in the District Court.

Counsel is mindful of the fact that Rule 40 of the Federal Rules of Appellate Procedure was not promulgated as a crutch for dilatory parties and that in the absence of demonstrable mistake the same matters that could have been addressed by responsive brief should not

be reargued by motion for rehearing. *U.S. v. Doe*, 455 F.2d 753 (1st Cir. 1972).

Mindful of these admonitions and the need not to abuse this privilege, counsel has reviewed the pleadings filed by the parties in the District Court, the District Court's order and this Court's opinion reversing the order of the District Court. That review has revealed what counsel believes to be a misapprehension of the nature of the commercial relationship between these parties and an oversight in the application of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (TILA), to that relationship.

This petition was prepared to point out to the Court these oversights and misapprehensions that, when reconsidered, will show the Court that a different result should apply.

The first area of the Court's opinion that requires reexamination is its analysis of the nature of the lease agreement between Clark and Rent-It and the consequences of that document to both parties.

While this Court criticized the District Court for its ". . . unduly restrictive . . ." analysis of the rental agreement, it has, by its ruling, glossed over the rather extensive "bundle of rights" that Clark was vested with in his agreement with Rent-It. This "bundle of rights" simply and rather straightforwardly removes this arrangement from the application of the TILA.

The agreement in question gave Clark a full range of enforceable options in his dealings with Rent-It. The most notable of these was the provision for terminating the contract. As pointed out by the District Court in its opinion: "[Clark] at [*his*] option [could] *at any time* terminate this agreement by return of the property to

[Rent-It] in its present condition fair wear and tear excepted." (Emphasis added.) Under the clear and unambiguous terms of that portion of his agreement, Clark could end his relationship with Rent-It by simply returning the goods and thereby having no further obligation to Rent-It. This was an unrestricted right. It could occur after 1, 2, 3 or any number of weeks. It could occur regardless of any unwritten expectations on the part of Rent-It as to the possible duration of its lease with Clark.

Further, Clark had an absolute right to demand that Rent-It maintain this property in proper working order at no additional cost to Clark.

Clark had an absolute right to exercise his option to renew for successive rental periods if he so chose. However, this was an option and, as pointed out above, he also had the unilateral right to reject that option, at any time, with no further obligations.

These rights are brought to the Court's attention because, by its order, this Court apparently has overlooked the fact that Clark was under no legally compellable obligation to renew his lease for any additional terms. No facts that may be discovered in the lower court can alter this. No factual scenario that Clark deems significant in this case has any impact on this absolute and unfettered right to stop renting this property at any time he chose.

But why is this oversight of such proportion that this Court should reconsider its opinion in this matter? Because in a lease agreement such as this where the rental fee for the *obligated* term is not ". . . substantially equivalent to or in excess of the aggregate value of the property . . . involved . . ." and the renter is under *no*

obligation to renew for any successive term or terms then the TILA does not apply. 15 U.S.C. § 1602(g).

Rent-It will not deny that the TILA has application to some leases. What this Court has overlooked is the difference between the type of lease covered by the TILA and the lease signed by Mr. Clark.

The TILA wisely provides for application to leases that are, in fact, credit sales dressed up to look like leases. However, it does not apply to all leases or even to all leases where a renter may ultimately receive title to the property.

The type of lease covered by the TILA has the following characteristics consistent with the definition of "credit sale" in 15 U.S.C. § 1602(g):

1. The total rental paid during the term is a sum substantially equivalent to or in excess of the aggregate value of the property rented.

2. During the term of the lease, i.e. the period during which the sum referred to above will be paid, the renter has no right to cancel without further obligation.

3. At the end of the term the renter, for no other or nominal consideration, becomes the owner of the property.

If a lease does not contain all of these characteristics then it cannot be covered by the TILA. Without all three characteristics a lease arrangement simply does not fit within the Act's definition of covered leases. To overlook this is not to *interpret* the law but rather to *rewrite* it.

The lease agreement that Mr. Clark signed did not contain the restriction listed above prohibiting cancella-

tion of his obligation until the full sum is paid. In fact, as pointed out, it specifically provided that he could so cancel. Mr. Clark's lease could not then be a TILA-covered rental arrangement.

Discovery will not change that fact. Mr. Clark's factual queries will not modify his right nor change the law as written.

This Court was correct in pointing out in its opinion that Congress "intended to include within the statutory definition of 'credit sales' purported leases if they are, in essence, disguised sale arrangements." However, the Court apparently overlooked the fact that the type of lease arrangement dealt with by the TILA is that described above and not that signed by Mr. Clark. The above cited statement of Congressional intent was made manifest in the TILA in a form Congress thought appropriate and that statement should not be used to encourage this or any other court to ignore the clear and unambiguous wording of the statute. Congress told the courts the parameters of the type of leases that should be scrutinized and covered by the TILA, and it would be improper for this Court to seize on the legislative equivalent of *obiter dictum* to ignore the statute as finally written.

Further, the Court has apparently overlooked an entire body of law in the area in the form of the Federal Reserve Board Staff Opinions that uniformly conclude that such lease transactions are not "credit sales" subject to the TILA. *See* Federal Reserve Board Staff Opinions No. 2701, July 31, 1973; No. 750, January 11, 1974; No. 761, March 12, 1974; No. 783, April 18, 1974, 5 CCH, CCG ¶ 31,105; No. 871, February 28, 1975, 5 CCH, CCG ¶ 31,202; No. 1010, February 25, 1976, 5 CCH, CCG ¶ 31,350; No. 1192, June 15, 1977, 5 CCH,

CCG ¶ 31,623; and No. 1259, October 20, 1977. Staff Opinions Nos. 750, 1192 and 1259 are particularly applicable to the consumer lease. The Fed Staff has concluded time and again that a short-term rental agreement with a continuing option to cancel by the consumer is not a "credit sale" because there is no contractual obligation on the consumer's part to pay "a sum substantially equivalent to or in excess" of the value of the leased property. The following excerpt clearly illustrates the point.

> A reading of the * * * program indicates that the lease with the option to purchase offered does not fall within the definition of a credit sale, because it does not meet the first requirement as set out in § 226.2(n) [renumbered 226.2(t)]: We note that the * * * lease agreement may be cancelled at any time, given 30 days prior notice, at no cost or penalty to the customer. In point of fact, item 3 of the agreement provides: "The term of this contract shall be for one month, beginning on the day of installation. Thereafter, this contract will automatically renew itself monthly for successive terms of one month each up to a maximum of thirty six (36) months . . . ." Therefore, a lessee under the plan would not have contracted "to pay as compensation for the use of a sum substantially equivalent to or in excess of the aggregate value of the property or services provided." Since the * * * program does not meet this criteria in the definition of credit sale, there is no need to determine whether its option price may be categorized as "nominal consideration."

(Excerpts from Federal Reserve Board Staff Opinion No. 750, January 11, 1974.)

This excerpt is repeated nearly word-for-word in Op. No. 1192, a more recent Fed staff opinion on the point (June

of 1977). Another strong staff statement is found in Op. No. 761.

The Supreme Court, in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 567, 568, clearly articulated the weight to be given the opinions of the staff of the Federal Reserve Board. The stated reason for this consideration and deference to the agency charged by Congress with promulgating the regulations under the TILA was because it is in line with ". . . language in the legislative history evinc[ing] a decided preference for resolving interpretive issues by uniform administrative decisions, rather than piecemeal through litigation." *Milhollin*, 444 U.S. at 568. This Court has apparently overlooked this significant directive from the Supreme Court that has particular application to the instant matter.

This Court's opinion should be reconsidered for yet another reason. In citing those cases dealing with "interpreting agreements" and seeking to ascertain the "parties' contractual expectations" this Court has overlooked some of the basic elements of contract law.

Initially, the subjective expectations of these parties, or the parties to any written contract, are irrelevant unless their writing is deemed to be ambiguous. Further, that issue is one of law and not of fact. Facts become relevant only when a court has decided, as a matter of law, that the contract or some portion of the contract is ambiguous. That is not the case here. The terms of Mr. Clark's agreement with Rent-It are clear, and simple, and do not suggest any ambiguity requiring a factual inquiry to determine the intent of the parties. It is true that the lynchpin of contractual interpretation is ascertaining the intent of the parties. But the court must first look to the words used by the parties and from

them seek to ascertain their intent. It is only when that intention cannot be so determined that the law allows the court to inquire factually. The impact of ignoring this well established body of law should not be overlooked by this Court.

Finally, the relief afforded Mr. Clark by this Court is the procedural equivalent of a "fishing license." There are no apparent limits on what discovery Mr. Clark may engage in. Relevance is no guide because this Court appears to be expanding the limits of relevancy here to infinite proportions. The potential for Rent-It to be victimized in the discovery process, pursuant to this Court's opinion, is awesome. The only limit will apparently be the ingenuity of Mr. Clark's lawyer. In this day of abusive discovery practices it is incredible to counsel for Rent-It that this Court could have misapprehended the consequences inherent in the nature of its ruling. The broad, sweeping, and unfettered discovery indicated in the last paragraph of this Court's opinion provides no clearly defined limits by which the District Court may circumscribe the discovery called for in the opinion.

Furthermore, in the event of a trial, what limitation will there be on evidence presented given the parameters set out by this Court? When Mr. Clark's lawyer asks him what he believed when he signed this clear, simply written, and unambiguous agreement that he either read or could have read, large bodies of the laws of evidence and contracts, as we know them today, will be totally ignored.

These then are the matters of law and fact that appear to be fundamental to this case yet have been overlooked or misapprehended by this Court. Counsel for Rent-It, however, is mindful that courts are aided greatly in not overlooking or misapprehending such issues when both

parties to appellate litigation thoroughly brief and argue the issues prior to the court ruling. Counsel regrets that the Court was not afforded this assistance in a more timely fashion but the importance of this ruling and its impact as precedent in the many areas mentioned above certainly dictate a rehearing on these critical yet misapprehended issues of fact and law.

Respectfully submitted,

/s/ J. Samuel Choate, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 1982, a copy of the foregoing Petition for Rehearing, was sent by first class mail, postage prepaid to:

Susan Barnes Brammer
Attorney at Law
102 East Grand Avenue
Des Moines, Iowa 50309

/s/ J. Samuel Choate, Jr.

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SUPREME COURT, U.S.

No. 82-996

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE RENT-IT CORPORATION,
Petitioner,

v.

WILLIAM CLARK,
Respondent.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the rental purchase contract entered into by the parties, providing for the "lessee" to become the owner of a television for no additional consideration upon completion of the scheduled payments is a disguised "credit sale" within the meaning of Section 1602(g) of the Truth-In-Lending Act, 15 U.S.C. 1601 et seq.

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STATUTORY PROVISIONS INVOLVED

1. Section 102 of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, codified at 15 U.S.C. 1601, provides:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strenghened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

2. Section 105 of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, codified at 15 U.S.C. 1604, provides:

> (a) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

3. Section 3(b) of the Consumer Credit Protection Act, Pub. L. 94-222, Feb. 27, 1976, 90 Stat. 197, codified at 15 U.S.C. 1640 (f), provides:

> No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpetation thereof by the Board or in conformity with any interpetation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpetations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after suchact or ommission has occurred, such rule, regulation, interpetation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

STATEMENT OF THE CASE

This case involves a claim for statutory damages under the Truth in Lending Act, 15 U.S.C. §1601, and the Iowa Consumer Credit Code, Chapter 537, Code of Iowa. The Plaintiff is a consumer who entered into a contract with the Defendant under the terms of which the Plaintiff could become the owner of a RCA color T.V. set upon the payment of One Thousand Three Hundred Twenty-Six Dollars ($1,326.00) over a period of one and one-half years. The contract executed by the Plaintiff did not disicose, however, the total cost of the T.V. set, the finance charge associated with the transaction, or the annual rate of interest.

Plaintiff's action was filed in the United States District Court for the Southern District of Iowa on December 12, 1980. On April 24, 1981, the District Court issued a Ruling sustaining the Defendant's Motion to Dismiss and granting a final Judgment in favor of the Defendant. On August 13, 1982 this decision was reversed by the United States Court of Appeals for the Eighth Circuit.

The facts as alleged in the Complaint are that on or about October 13, 1979, the Plaintiff (Mr. Clark) signed a contract with the Defendant (company) under which he could own a RCA color T.V. set. The terms of the agreement were that Mr. Clark could pay weekly installments of Seventeen Dollars ($17.00) each and at the end of Seventy-Eight (78) consecutive weekly payments, the title to the T.V. set would be his (Exhibit A. of Complaint). The contract also provided that Mr. Clark could terminate it at any time by returning the property to the company and paying any installments due. Pursuant

to the agreement, Mr. Clark took possession of the T.V., used it in his family residence, and paid installments for approximately three months. (Complaint p. 2). In the latter part of January, 1980, Mr. Clark fell behind on an installment, and the company removed the T.V. set, without notice, from his residence. (Complaint p. 2). One week later, Mr. Clark again contacted the company to secure the return of his television set. (Complaint p. 2). A second contract was executed which was nearly identical to the first document and the identical T.V. set was returned to Mr. Clark. (Exhibit "B" of Complaint). Mr. Clark continued to make payments pursuant to the contract from February, 1980, to the latter part of July, 1980. (Complaint p. 2). In August, 1980, the company again repossessed the television set and thereafter refused to enter into any further transactions with Mr. Clark. (Complaint pp. 2-3). At that point, Mr. Clark had paid the company over Six Hundred Dollars ($600.00) and only had the use of the television for approximately nine (9) months (Complaint p.2).

I

THE SUPREME COURT SHOULD DENY THE PETITION FOR CERTIORARI BECAUSE THE APPELLANT-PETITIONER HAS NO REAL INTEREST IN PROSECUTING THIS CASE.

The party requesting this Court for a Writ of Certiorari is allegedly The Rent-It Corporation. In fact, the Rent-It Corporation (the appliance rental business against whom William Clark brought his claim) has had no involvement in this case since the District Court proceedings. The Rent-It Corporation made no appearance nor filed any brief before the Eighth Circuit Court of Appeals. See Opinion Below at 685 F.2d 245, 246 (8th Cir. 1982).

The Rent-It Coroporation is no longer doing business in Iowa (the site of the claim) and has lost its good standing in its state of incorporation, Missouri. See Appendix p.20 attached. Nor can The Rent-It Coropration be contacted at its former headquarters in Kansas City.

After the decision below of the Eighth Circuit Court of Appeals, this counsel was contacted by Petitioner's counsel, J. Samuel Choate, who stated he was retained by the Association of Progressive Rental Organizations (a trade association of appliance rental businesses), through its counsel, Attorney Ed Winn of Austin, Texas, to seek a reversal of the Eighth Circuit decision. Mr. Choate and Mr. Winn have informed this Counsel on at least three occasions, up to and including after the filing of the Petition for Writ of Certiorari herein, that they have had no contact with The Rent-It Corporation or its officers or stockholders. The only authorization to proceed in this matter which opposing counsel has asserted to Mr. Clark's attorney is the tacit approval of the trial counsel, Rosenberg and Margulies of Des Moines, Iowa, who themselves have told Mr. Clark's counsel that they have had no direct contact with The Rent-It Corporation since the District Court proceedings in May of 1981.

It would appear that The Rent-It Corporation is no longer a viable business, is no longer in good standing as a Corporation, and has no real interest in further pursuing this case. The Association of Progressive Rental Organizations, which has never been a party to this case, cannot assume the rights of The Rent-It Corporation to petition for a Writ of Certiorari herein, and is certainly not responsible for any judgment William Clark may eventually obtain against The Rent-It Corporation. Thus, the Association has no real case or controversy with William Clark. It's desire for the reversal of the case because of its allegedly harmful precedential value is not legally sufficient to maintain the Petition for Certiorari herein. The Petition for Certiorari should be denied.

II

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE GROUNDS ASSERTED IN SUPPORT THEREOF WERE NEITHER RAISED, CONSIDERED, NOR DECIDED IN THE COURTS BELOW.

The gravamen of Petitioner's argument for this case to be heard by the Supreme Court is that the lower courts allegedly totally ignored unofficial staff opinions of the Federal Reserve Board as well as the Supreme Court's admonition in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) to uphold the Federal Reserve Board unless "demostrably irrational." (Pet. for Cert., 7).

In fact, no Federal Reserve Board staff opinions were ever raised in the District Court or the Court of Appeals, other than in the request for Rehearing. See Opinions below at 511 F. Supp. 796 (S.D. Ia. 1981) and 685 F. 2d 245 (8th Cir. 1982) respectively.

Petitioner in the district court filed no brief in support of its Motion to Dismiss, nor cited any authority for its position in the Motion itself. In the Court of Appeals, Petitioner didn't even bother to appear or file a

brief in opposition. See 685 F.2d, at 246. The lower courts had no opportunity to review the Federal Reserve Board unofficial opinions or to compare the facts underlying those opinions to the circumstances of The Rent-It Center Corp - Clark transaction. Thus there is no justification for Petitioner's charge that the lower courts were totally ignoring Federal Reserve Board opinions.

Nor does counsel for Association of Progressive Rental Association's belated plea for a Rehearing in the name of the Petitioner justify his charge that the Court of Appeals was attempting to usurp an administrative agency's responsibility for interpreting the Truth-In-Lending Act, 15 U.S.C. 1601 et seq. There were no grounds given for the denial of a rehearing. The fact that Petitioner had failed to brief or otherwise present his new argument prior to the Request for rehearing was sufficient grounds to refuse to review his new argument for the first time on Rehearing. Likewise it is sufficient grounds for this Court to Deny a Petition for Certiorari to hear an argument never raised, considered, nor decided in the Court below.

III

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT IS PREMATURE TO DECIDE TILA COVERAGE BEFORE EVIDENCE OF THE TRUE SUBSTANCE OF THE TRANSACTION IS PRESENTED.

This case is before the Court on allegations of error in the lower court's rulings on a Motion to Dismiss. The Court of Appeals did not decide that the rental-purchase agreement herein was a credit sale under the Truth-in Lending Act, 15 U.S.C. 1601 et seq (hereinafter TILA). The appellate court decided only that Clark should be given an opportunity to prove that the agreement was a disguised credit sale contrived to evade regulation by the TILA.

> "Clark should be given an opportunity to substantiate these claims, and to establish that the 'rental agreement with option to purchase' was in fact a disguised credit sale. 685 F.2d 245, at 248.

So the applicability of TILA to this transaction between the parties remains to be decided. The appellate court was merely adhering to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, at 45-6 (1957). This rule is especially appropriate to TILA cases because it often involves claims against creditors attempting "to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish." Mourning v. Family Publications Services, Inc., 411 U.S. 356, at 365 (1973). In TILA cases, the substance, rather than the form of the transaction needs to be examined to correctly apply the law to the facts at hand.

> In interpreting the act, the federal reserve Board and the majority of courts have focused on the substance, rather than the form, of credit transactions, and have looked to the practices of the trade, the course of dealing of the parties, and the intention of the parties in addition to specific contractual obligations. Joseph v. Norman's Health Club, Inc., 532 F.2d 86 at 90 (8th Cir. 1976).

See also Hickman v. Cliff Peck Chevrolet, Inc., 566 F.2d 44, 46 (8th Cir. 1976). Short of an Answer being filed and discovery had, courts have been reluctant to rule as a matter of law that rental-purchase agreements have successfully evaded TILA coverage. In Jones v. Action T.V. Rental Civil Action No. 79-1535 (E.D. Pa. June 30, 1980) reprinted in Appendix, the Court states:

> Although bona fide leases are not covered by the Truth in Lending Act, leases which are actually disguised sales agreements, designed to evade regulation, do come within the act. Green v. Arrata Leasing Corp., No. C-75-0157 (N.D. Cal., April 8, 1975). Through discovery, evidence may surface which will show that these agreements actually allow for extended credit sales. Since discovery may assist in determining the validity of plaintiff's alternative claim, the motion to dismiss on the ground that these transactions are not credit sales is denied. Id at 9. (App. p.21)

The Court in Burks v. Curtis-Mathis Centers, Inc., Civil No. 4-79-429 (D. Minn. Nov. 14, 1980)(reprinted in App.) similarly wanted to examine the substance of the transaction rather than the mere form before deciding whether the agreement was a credit sale under TILA.

> It is appropriate in this case to look beyond the form to the substance of the parties' agreement, but on the present state of the record it is impossible to determine whether the agreements were true leases or disguised sales agreements. If, as the plaintiff contends, the parties did view the agreement as a single agreement over an extended period, then the plaintiffs would have contrated to pay a 'sum substantially equivalent to or in excess of the aggregate value of the property..." and the transaction would be a credit sale. Facts that would be helpful to the court in making its determination include the percentage of customers in the 'rent to own' program that actually become owners and the operation of the contractual clause regarding the customer's responsibilities for damage. Presently, the matter is not ripe for decision. Id.

At trial William Clark will attempt to present evidence establishing the subject transaction as a credit sale under TILA, including, but not limited to, the following:

1) Clark responded to Petitioner's T.V. advertisement of a purchase plan with no down payment and no credit checks;

2) Clark intended from the outset to purchase the television;

3) Petitioner knew Clark intended to purchase the television;

4) The language of the contract is consistent with an intent to purchase;

5) Petitioner devised his business primarily to attract low-income consumers who would like to purchase televisions, but cannot obtain conventional financing;

6) Most of Petitioner's customers intend to purchase;

7) Most customers do eventually buy the television;

8) Petitioner actually performed at least minimal credit checks on potential customers;

9) Petitioner charged purchasing customers at least two to three times the retail value of the television sets;

10) Petitioner's scheme was designed to evade usury and TILA laws; and

11) Many customers would refuse to buy or, at least first shop elsewhere if they realised the actual deferred payment price.

The decision of the Court below merely prohibits the dismissal of Clark's claim because of any doubts by the trial court that he could prove all or some of the above facts necessary to Clark's claim of a disguised credit sale. See Opinion 685 F.2d, at 248. This is in accord with established precedent. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974).

The Eighth Circuit has rightly refused to let the form of a purported rental agreement (the body of whose language is in no way totally incompatible with an intention by the parties to sell the television) ride roughshod over the true nature of the contract. The issue to be decided after trial is, if all of the above facts are true, has Petitioner successfully devised a scheme to evade the disclosure protections Congress intended to provide in TILA to consumers like Mr. Clark.

IV

UNOFFICIAL STAFF OPINIONS OF THE FEDERAL RESERVE BOARD LACK THE STUDIED CONSIDERATION GIVEN OFFICIAL INTERPRETATIONS AND LETTERS BY THE BOARD AND SHOULD NOT BE GIVEN THE DEFERENCE OF THE "DEMONSTRABLY IRRATIONAL" STANDARD ENUNCIATED IN MILHOLLIN V. FORD MOTOR CREDIT COMPANY.

This Court in Milhollin v. Ford Motor Credit Company, 444 U.S. 555 (1980) held that official interpretations of the Federal Reserve Board and its staff interpreting gaps in Regulation Z were binding on the Courts unless "demonstrably irrational." Id, at 568. The Federal Reserve Board's position (upheld by the Court in Milhollin) that an acceleration clause need not be disclosed was promulgated in an official staff letter.

The procedure for issuing staff letters provides that they be published in the Federal Register (12 CFR 226.1(d)(2)(ii)(1981) subjected to public comment, be issued only by duly authorized officials (12 CFR 226.1(d)(4)(1981), and receive the benefit of other procedural safeguards.

Unofficial staff opinions (such as those relied on by Petitioner herein) were not formulated with the same safeguards or studied consideration as official interpretations. They were not reviewed by the Federal Reserve Board itself. They were not published in the Federal Register or Code of Federal Regulations. They were issued at staff members' discretion (12 CFR 226.1(d)(1)(1981), in response to a specific parochial concern of an individual creditor, who must be relied on to present all the relevant facts to the staff members. They were used in situations demanding a "rapid response" from Federal Reserve Board employees. (12 CFR 226.1(d)(1)(1981).

The Board by regulation explicitly excepts these unofficial staff opinions from being relied on for the purposes of the "good faith" defense created by 15 U.S.C. 1640(f).

> "(d) Issuance of staff interpretations.
>
> (1) Unofficial staff interpretations will be issued at the staff's discretion where the protection of section 130(f) of the Act is neither requested nor required, or where a rapid response is necessary." 12 CFR 226.1(d)(1)(1981).

The Courts have likewise held that unofficial staff opinions are no defense under 15 U.S.C. 1640(f). Jones v. Community Loan and Investment Corp, 544 F.2d 1228 (5th Cir. 1976) cert. den. 431 U.S. 934 (1977).

Courts speaking on the subject both before and after Milhollin have rejected any attempt to invoke unofficial staff opinions as authoritative interpretations of TILA or the regulations. For decisions prior to Milhollin see Basham v. Finance America Corp., 583 F.2d 918, 925 (7

Cir. 1978) Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976), Gillard v. Aetna Finance Co., 414 F. Supp. 737 (D. La. 1976). For decisions subsequent to Milhollin see Bury v. Marietta Dodge, 692 F.2d 1335, 1339-40 (11th Cir. 1982) and Davis v. Colonial Securities Corp., 541 F. Supp. 302, 305 (E.D. Pa. 1982). The Bury court perceptively stated:

> Bury is correct in stating that if we give the two letters of the staff attorneys the same weight as official staff interpretations of the Federal Reserve Board, these board letters would have the effect of overruling Whitfield v. Termplan. We cannot allow this result, because it would then follow that any attorney of the Federal Reserve Board could write a letter indicating his own private interpretation of a regulation or statutory provision, indicate in the letter that he feels his interpretation to be indicative of the Federal Reserve Board's interpretation of the statute, and thereby, automatically reverse any court's decision which holds otherwise. If we follow Bury's reasoning, a court can be controlled by staff interpretations which need not be published. A staff attorney could write a letter, keep it in his desk, and yet produce a letter which would control each court in the nation. We cannot believe that this is the result which the Supreme Court intended.
>
> As the Supreme Court said in Milhollin, the opinions of members of the Federal Reserve Board should be given considerable weight unless they are "demonstrably irrational." Milhollin, 444 U.S. at 565, 100 S.Ct. at 797. To give controlling weight to a staff letter by an attorney on the Federal Reserve Board, writing to anyone in the country as to his interpretation of statutory construction, would produce a demonstrably irrational result, and is therefore not the path which we choose to follow. We believe that the Supreme Court has dictated that we follow official staff interpretations of the Federal Reserve Board, and we do not believe the two letters appended to Bury's motion to alter judgment to be official staff interpretations. 692 F.2d at 1339-40.

Nor does the subsequent promulgation of a new definition of "credit sale" in the current Regulation Z (12 CFR 226.2(16)) cure the inadequacies of the unofficial staff opinions. There are three reasons:

1) The current Regulation Z was not even written at the time of the subject transaction in October, 1979 and on February 1, 1980 and clearly not applicable to this case;

2) The new regulation only exempts leases terminable without penalty to the debtor from the definition of credit sale, while in this case Mr. Clark was severely penalized by the loss of over $600 and a color television set; and

3) The current regulation, if interpreted as excluding Mr. Clark from the protection of the TILA is plainly wrong and demonstrably irrational.

V

THE SUBJECT RENTAL PURCHASE AGREEMENTS ARE DISGUISED CREDIT SALES, SUBJECT TO THE TILA, AND ANY FEDERAL RESERVE BOARD OPINION OR REGULATION TO THE CONTRARY IS DEMONSTRABLY IRRATIONAL.

No matter what is argued regarding the coverage by the Truth in Lending Act of rental purchase agreements, it is beyond cavil that consumers such as Mr. Clark were exactly the type of consumer Congress attempted to help with the disclosure provisions of the Act. Clark was attempting to purchase a television (not warranted to be new) worth at the most approximately $600. Although enticed by the absence of a downpayment, he was not told he would pay $1326. over a year and a half. The dollar cost of his inability to pay cash was approximately $726. As a credit sale the annual percentage rate would be so high it is beyond the highest listing in the Annual Percentage Rate Tables published by the Board (53.91% for a schedule of 78 weekly payments). Who can deny Mr. Clark and others would greatly benefit from comparison shopping to ascertain "more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601.

Petitioner would have this Court believe Congress so inartfully drafted the TILA so as to allow this one group of low income consumers to slip beyond the pale of the protection of the Act.

Congress certainly thought it had drafted a statute in TILA that was sufficiently comprehensive and flexible to encompass every lease that could terminate in vesting ownership of the property for no or nominal consideration in the lessee. The House Report on the bill adopted language covering disguised leases nearly identical to that generally prevalent in other areas of commercial law.

> The language covering disguised leases is nearly identical to the language used in the Uniform Conditional Sales Act and the many state retail installment acts to distinguish between 'true' leases and other leases.

House Report 1040, 1968 U.S. Code Cong. and Ad. News 1980. Later in enacting the Consumer Leasing Act of 1976, P.L. 94-240, 90 Stat. 257, 15 U.S.C. 1667 et seq., the Senate Report described leases with an option to purchase as already covered by the TILA.

> In its 1974 Annual Report, the Federal Reserve Board pointed out that the existing Truth in Lending Act had no application to leases (other than leases with an option to purchase at a nominal price).

> Yet the Truth in Lending Act's careful and thorough disclosure requirements do not apply to any lease unless it contains an option to purchase at no, or a nominal consideration.

> Those occasional leases which include an option to purchase at no or a nominal consideration are left subject to the Truth in Lending Act, however, on the theory that they are closer equivalents to credit sales and ought to include finance-charge and annual percentage rate disclosures. Senate Rep. 84-590, 1976 U.S. Code Cong. & Ad. News 432, 433, 434.

So-called lease purchase contracts are a convenient means for the low-income consumer to finance the purchase of consumer goods, and thus these "leases" are functionally equivalent to credit sales. See Note, The Applicability of The Federal Truth-in-Lending Act to Rental Purchase Contracts, 66 Cornell Law Rev. 118, at 125 (1980). The TILA was designed by Congress to give all consumers purchasing on credit, (no matter the written device used to formalize the purchase) the opportunity to make an informed use of credit. In fact, Congress went so far as to give the Federal Reserve Board the authority necessary "to prevent circumvention or evasion" of the TILA. 15 U.S.C. 1604.

In the case of rental purchase contracts, the Federal Reserve Board staff, instead of using the law to prevent circumvention of the TILA, as intended, has unreasonably used its regulatory power to give its imprimatur to a flagrant and harmful example of the uninformed use of credit.

The reason the Federal Reserve Board staff has adopted this unreasonable position is because they failed to examine the facts underlying the transaction. Instead they responded to written inquiries of creditors who supplied only the facts they thought relevant, the written agreement. The unofficial staff opinions cited by the Petitioner do not discuss facts tending to prove that these rental purchase contracts might be a scheme to avoid coverage of the Act. The staff does not discuss whether merchants are primarily promoting these leases as a convenient means to purchase appliances; whether most consumers entered the contracts principally to buy; whether most consumers quickly make such a heavy investment in the appliance relative to its typical retail value that it is financially prohibitive to terminate. Mr. Clark, for example, had already "invested" $238 (over one-third the retail value of a new set) into the subject television at the time of the termination of his first contract, and had no sensible financial alternative but to attempt to reinstate the contract.

The superficial handling by the Federal Reserve Board staff an ever-expanding consumer merchandising field was totally inconsistent with the time-honored analysis used by Courts and agencies in other areas of commercial law. This Court held in 1876 that

> "[i]n determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties." Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 672 (1876)

Whether a written agreement is a true lease or a sale is one of the most frequently litigated issues under the Uniform Commercial Code. See J. Whiet and R. Summers, Handbook of the Law Under the Uniform Commerical Code, 878 (2d Ed. 1980). In U.C.C. litigation other factors besides the lease agreement itself are always considered, such as the expectation of the parties, practice in the industry, and the true economic effects of the transactions. See Claxton, Lease or Security Interest: A Clasic Problem of Commercial Law, 28 Mercer L. Rev. 599 (1977).

The fact that certain "leases" have termination or open-end clauses, such as Mr. Clark's, has not prevented Courts from finding them security interests under the U.C.C. United Rental Equipment Co. v. Potts and Callahan Contracting Co., 231 Md. 552, 191 A.2d 570 (1973). A similar result was reached in the bankruptcy case of In re Royer's Bakery, 1 U.C.C. Rep. 342 (E.D.Pa. 1963).

In tax matters, Courts have traditionally looked to the parties' conduct as well as the substantive provisions of the agreement to determine whether a lease or sale is involved. Swift Dodge v. Comm., 692 F.2d 651, 652 (9th Cir. 1982); Frank Lyon Co. v. U.S., 435 U.S. 561 (1978).

The Federal Reserve Board staff's decision to relegate consumers in Mr. Clark's situation to a "let the buyer beware" position is out-of-step with its other attempts to render the TILA effective, such as in the adoption of the Four Installment rule. See Mourning v. Family Publications Service Inc., 411 U.S. 356 (1973). That rule was admittedly broad enough to cover some

merchants who did not even charge credit, but who were included under the TILA for the sake of the greater effectiveness of the enforcement of the Act. Id., at 373-4. Likewise, it is no excuse to exclude the vast majority of consumers who intend to use the rental purchase agreement to buy appliances (See Note, 66 Cornell Law Rev. 118, 137, supra) because there are some who only intend a short-term rental.

Another unreasonable basis for the Federal Reserve Board staff's position on rental purchase agreements is their equation of the words, "contracts to pay" with "obligation to pay." That is an unreasonable gloss on the statute in light of the TILA's broad remedial purpose. Rachbach v. Cogswell, 547 F.2d 502 (10th Cir. 1976).

Nowhere in the definition of "credit sale" does it say that a lessee must be obligated to pay rent in an aggregate sum which equals or exceeds the value of the rented property. Under the parties' agreement, Mr. Clark had the right by contract to pay $17.00 for 78 weeks or a total of $1326, and title to the set would be transferred to him. It is true that Mr. Clark had the option of not paying the weekly fee, thereby terminating the agreement. This provision did not change the essential nature of the agreement as a contract to pay $17. for 78 weeks with the intent of owning a television. "A contract can create an 'option' that is conditional, a power to terminate on the happening of some stated future fact or event. . . . On the other hand, a contract can create an unlimited and unconditional option, a power to terminate at will." 3A Corbin on Contracts §647 at 103 (1960 ed). In any event, terminable or not, the buyer is still contracting to pay in excess of the value of the property.

Nor is it true that there is no cost or penalty to Mr. Clark for terminating the contract. The Unofficial Staff Opinions seem to rely on the lack of a penalty to the "lessee" as a principal basis for denying coverage.

> "Such termination by the lessee results in no penalty or additional cost being imposed on the lessee" Unofficial FRB letter No. 1192, June 15, 1977 5 CCH, CCG §31,623

Mr. Clark suffered severe financial damage by his loss of over $600 and his television set. Many other consumers suffer similar damage because of the rapid accumulation of their "investment," as the rental payments mount up. What seems like a low monthly or weekly payment soon locks them into a financial course lowincome consumers may be unable to maintain, much to their severe penalty, especially when they may have paid far more than the value of the appliance in a year's time. See Des Moines Tribune, August 18 1981, App. p.51).

The Federal Reserve Board staff is demonstrably unreasonable in not seeing that the status of a lessee such as Mr. Clark is practically indistinguishable in effect from that of a buyer under a conditional sales contract:

1) Both buyer and lessee must be transferred title as of right at the end of the scheduled payments;

2) The lessor and vendor both have the right to end the agreement and regain possession of the property for nonpayment of a scheduled payment;

3) In both cases all payments are applied toward the cost of acquiring the property;

4) Neither lessee nor buyer generally have the right to encumber the property or remove it from their residence;

5) The failure to make timely payments terminates the right to possession of both lessee and vendee.

6) Both lessee and buyer are responsible for the fair market value of lost, damaged, or destroyed property.

The only difference is that the buyer is liable for a deficiency in the resale of the collateral. This difference fades into near oblivion when one considers the unlikelihood of the low-income consumers (many judgment proof), to whom this rental purchase agreement is promoted, ever truly being held accountable to pay the deficiency.

The Federal Reserve Board staff is demonstrably irrational in not examining the underlying facts, practical effects, and economic realities of the rental purchase agreements, as have the Courts, such as the Eighth Circuit herein, who have recently recognized both these uninformed lessees and these disguised sales agreements

as the proper object of F.R.B. broad regulatory authority. See Davis v. Colonial Securities Corp., 541 F. Supp. 302 (E.D.Pa 1982); Waldron v. Best T.V. and Stereo Rental, Inc., 485 F. Supp 718 (D.Md. 1979); Jones v. Action T.V. Rental, Civil Action No. 79-1535 (E. D.Pa. June 30, 1980); Burks v. Curtis-Mathis Centers, Inc., Civil No. 4-79-429 (D. Minn. Nov. 14, 1980); Murphy v. McNamara, 27 U.C.C. Rep. Serv. 911 (Conn. Super. Ct. 1979); Johnson v. McNamara, Civil No. H-78-238 (D. Conn. 1979). Each of these Courts gave the consumer the right to prove rental purchase agreements to be credit sales. These Courts, like the authors of the UCC, state that whether a lease is intended as a security or a lease must be determined not by blind adherence to form but by the facts of each case. Section 1-201 (37) U.C.C. Any other conclusion is "demonstrably irrational."

CONCLUSION

Functionally equivalent to credit sales, rental purchase contracts are highly attractive sales devices for retailers anxious to derive substantial profits. Note, 66 Cornell Law Rev. 118, 130-31, supra. Using this techinque the merchant may conceal the costs of deferred payment as well as the total purchase price. Id. He reaps the benefits of credit sales without the responsibilities of the TILA.

The exclusion of rental purchase contracts creates the same problems Congress enacted the TILA to cure. Id. Such a position frustrates comparative shopping and undermines competition among financial institutions and the informed use of credit. The opinion of the Eighth Circuit Court of Appeals in this case helps to restore that competition. The decision should therefore not be reviewed.

Anthony Touschner

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Attorney for Respondent
William Clark
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Des Moines, IA 50309
(515) 243-1193

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing were deposited in the United States mail, postage prepaid, on the 28th day of January, 1983 addressed as follows:

J. Samuel Choate Jr.
Attorney at Law
505 First National Bank Building
801 Broad Street
Augusta, GA 30903

Anthony Touschner

I certify that a copy of the foregoing Brief was deposited in the United States mail, postage prepaid, on the 28th day of January, 1983, addressed as follows:

Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Anthony Touschner

SUBSCRIBED AND SWORN to before me this 28th day of January, 1983, by Anthony J. Touschner, Attorney for Respondent.

Phyllis A Larsen
NOTARY PUBLIC
In and for the State of Iowa

State of Missouri . . . Office of Secretary of State

JAMES C. KIRKPATRICK, Secretary of State

LEGAL AID SOCIETY OF POLK COUNTY
102 EAST GRAND AVE.
DES MOINES, IOWA 50309

ABSTRACT OF CORPORATE RECORD

Today's date is Dec. 14, 1982

Re: THE RENT-IT CORPORATION (# 200377)

The records of the Corporation Division, Office of the Secretary of State, State of Missouri, show that the above corporation:

XX Is a Missouri corporation incorporated on May 1, 1978

____ Is a _____ corporation which qualified in Missouri on _____

XX Registered Agent is John H. Schmidt

XX Registered Office is 610 Woodruff Bldg., Springfield, Missouri

____ Is in Good Standing

XX Filed its most recent Annual Report listing officers & directors in 19 80
(Copy Attached)

XX Is not in Good Standing because charter was forfeited January 1, 19 82 for
XX Failure to file the annual registration report
____ Failure to pay corporate franchise taxes
____ Failure to file the foreign corporation affidavit
____ Fraud
____ Failure to maintain a registered agent and office

____ The corporation is no longer in existence because articles of dissolution and liquidation were filed, and a certificate of dissolution was issued on _____

____ Other Data:

James C. Kirkpatrick

JAMES C. KIRKPATRICK
Secretary of State

SS

26,985
10p.

FOR LEGAL SERVICES

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERNESTINE JONES AND HARRY JACKSON AND MAE JACKSON on behalf of themselves and all others similarly situated	:	CIVIL ACTION
vs.	:	FILED JUN 30 1980
ACTION TV RENTAL, INC.	:	NO. 79-1535

MEMORANDUM & ORDER

GREEN, J. JUNE 30, 1980

The named plaintiffs in this action seek to represent a class consisting of all customers who have entered into, or will enter into transactions to lease televisions from the defendant, Action TV Rental, Inc. The plaintiffs allege the following facts. They saw advertisements offering the opportunity to obtain their own television for a small downpayment. In response to these advertisements, they contacted the defendant by phone. Over the phone, the plaintiffs were informed of the weekly or monthly payment required, and the amount of the downpayment. An agent of the defendant then came to the plaintiffs' houses with the result that they signed rental agreements.

The document signed by the plaintiffs is headed, "This is a Rental Agreement with Option to Purchase." The terms of the agreement include the weekly or monthly payments due and the delivery fee. The lease is renewable by paying the weekly or monthly fee in advance. If the lease is continued for a stated period of time and payment provisions are complied with the title to the property is to be transferred to the renter. The agreement provides, however, "Renter is required to rent the equipment for only one week [month]."

Seeking both monetary and injunctive relief, the plaintiffs instituted this action which contends that the defendant's lease arrangements violate various provisions of the federal Truth-in-Lending Act, 15 U.S.C. §§1601, et seq.

Regulation "Z", 12 C.F.R. §226, and the Federal Trade Commission (hereinafter "FTC") "Door-to-Door Sales Rule," 16 C.F.R. §429.1, and state law governing door-to-door sales. Subject matter jurisdiction over the action is alleged pursuant to the provisions of 28 U.S.C. §1337, 15 U.S.C. §§1640(e) and 1667d, and the doctrine of pendent jurisdiction.

The defendant responded to the amended complaint by filing the motion to dismiss now before the Court. The defendant advances a series of arguments for dismissal. First, defendant contends that the Truth-in-Lending Act does not apply to these transactions because the rental agreement is neither a "consumer lease" as defined in 15 U.S.C. §1667 nor a "credit sale" as defined in 15 U.S.C. §1602(g); thus, it is argued, the plaintiffs have failed to state a claim upon which relief may be granted. Defendants next argue that the facts alleged by the plaintiffs do not bring this transaction within the ambit of the FTC Door-to-Door Sales Rule. Further, defendant contends that dismissal of the claims based on the FTC Rule and the Truth-in-Lending Act removes the Court's basis for pendent jurisdiction over the state claims. Finally, defendant argues that this suit should be dismissed because the plaintiffs are not eligible for representation by Community Legal Services, Inc. and the claim is not within the statutory authorization of Community Legal Services. For the reasons stated below, the motion to dismiss is denied.

1. Representation by CLS

At the outset, we can dispatch with defendant's last argument. The plaintiffs contend, and we agree, that the issue of plaintiffs' representation by Community Legal Services, Inc. (CLS) is not an appropriate matter for consideration by the Court. We note that no facts disclosing

ineligibility appear on the face of the amended complaint. For this reason alone, the motion should not be granted. We need not rely on this pleading ground, however, since a provision of the statute setting up the Legal Services Corporation clearly states:

> No question of whether representation is authorized under this title or the rules, regulations or guidelines promulgated pursuant to this title, shall be considered in, or affect the final disposition of, any proceeding in which a person is represented by a recipient or an employee of a recipient.

42 U.S.C. §2996e(b)(1)(B). Since plaintiffs in this action are represented by CLS, a recipient of the Legal Services Corporation, the provision quoted above precludes any consideration of their representation in disposing of the instant motion.

2. FTC Door-to-Door Sales Rule Claim

The FTC Door-to-Door Sales Rule, codified at 16 C.F.R. §§429.1, et seq., requires a "cooling off period", along with the inclusion of certain specific items on a sales receipt, for any door-to-door sale. A "door-to-door sale" is defined as:

> A sale, lease or rental of consumer goods, or services with a purchase price of $25 or more. . ., in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller.

16 C.F.R. §429.1, Note 1(a). Defendant contends that its transactions with the plaintiffs are not within the scope of this Rule for two reasons: first, there was no personal solicitation and second, the buyer agreed to the lease over the phone and not at a place other than defendant's "place of business."

Among other exemptions, the Rule specifically excludes from the definition of "door-to-door sale", any transaction:

> (4) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services;

Defendant does not argue, however, that these transactions fall within this exception. Instead, it argues, in essence, that its business practices are not the type of conduct that the Rule was intended to regulate.

Plaintiffs, on the other hand, allege that agreement was not reached until the defendant's representative came to their homes and explained all the terms of the transaction. Pursuant to Fed. R. Civ. P. 12(b)(6), a motion to dismiss for failure to state a claim should not be granted unless it appears that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Cramer v. General Telephone & Electronics Corp., 582 F.2d 259, 272 (3d Cir. 1978) (quoting Conley v. Gibson, 355 U.S. 41, 45-6, 78 S.Ct. 99, 102 (1957)). In this case, the plaintiffs have pleaded facts which bring the transactions within the scope of the Door-to-Door Sales Rule. Therefore, the motion to dismiss on this ground is denied.

3. The Truth-in-Lending Act Claim

The Truth-in-Lending Act, 15 U.S.C. §1601 et seq. was enacted to remedy the problems that resulted from a rapid expansion in the use of consumer credit. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 364 93 S.Ct. 1652, 1658 (1973). When a transaction falls within the purview of the Act, full disclosure of the credit terms is required, so that / customers can compare credit arrangements and make informed purchase decisions. Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3d Cir. 1975). Since the Act is remedial in nature, it must be construed broadly. Id.

The plaintiffs contend that the rental agreement used by Action TV Rental, Inc. is a "consumer lease" as defined

in 15 U.S.C. §1667(1). Alternatively, plaintiffs contend that the agreement constitutes a "credit sale" as defined in 15 U.S.C. §1602(g). These definitions provide:

> (1) The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for a personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 1602(g) of this title. Such term does not include a lease for agricultural, business or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.
>
> (g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

Strictly construing these provisions, the defendant argues that this action should be dismissed because the rental agreement does not fit within the definitions of either a consumer lease or a credit sale. Since the rental terms specified in the agreements are one week or one month, with right to renew, defendant argues that these are not "lease[s] . . . for a period of time exceeding four months. . .," and therefore do not come within the Truth-in-Lending Act. The defendant further contends that these agreements are not credit sales, as defined in the Act, because the plaintiffs did not "contract to pay as compensation. . . a sum substantially equivalent to or in excess of the aggregate value of the property . . . involved . . . ." Instead, defendant argues that plaintiffs' only obligation was to pay the weekly or monthly rental fee or return the television set. Both of the parties have cited numerous cases, as well as interpretations of the Act by the staff of the Federal Reserve Board (FRB), in support of their respective arguments.

A. The Consumer Lease Provision

The defendant argues that Action TV Rental's lease arrangements with the plaintiffs are not "consumer leases" because they did not obligate the renter for a term exceeding four months. The defendant relies on an interpretive letter issued by the Federal Reserve Board, FRB letter No. 1169 of March 28, 1977 reported at CCH Consumer Credit Guide ¶31,566, which states:

> It is the staff's opinion that none of the[se] contracts . . . is a "consumer lease" under the Consumer Leasing Act. . . . The Act and regulation clearly provide, . . . that a "consumer lease" is a "contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months." Thus, a lease of personal property for four months, three months or on a month-to-month basis (even though the lease extends beyond four months) is not a consumer lease within the meaning of the Act . . . provided that a term of four months or less is not employed by the lessor for the purpose of circumvention or evasion of the statutory . . . requirements.

Pointing to the provision at the end of the portion quoted above, the plaintiffs argue that they should have an opportunity to learn, through discovery and trial, the "true nature" of the defendant's business practices.

Courts have been sensitive to the possibility that creditors might attempt to circumvent the provisions of the Truth-in-Lending Act. In Mourning v. Family Publications Service, Inc., supra, the Supreme Court observed:

> The language employed [in the Act] evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish.

411 U.S. at 365, 93 S.Ct. at 1658. Mindful of this sensitivity, and the remedial purposes of the Act, we find that dismissal is inappropriate at this time. Upon completion of discovery, the plaintiffs may be able to prove that the defendant used its rental agreement to attempt to evade

The Truth-in-Lending Act. These transactions would then fall within the definition of "consumer lease", and be subject to the requirements of the Act. Plaintiffs should have the opportunity to complete discovery and gather evidence showing that they are entitled to relief. See, Hooker v. Sight and Sound of Michigan, Inc., No. 79-1335 (E.D. Mich. Feb. 15, 1980). Therefore, we deny the motion to dismiss on this basis.

B. The Credit Sale Provision

The defendant argues that Action TV's rental agreements do not fall within the definition of "credit sale", supra, because the plaintiffs did not "contract to pay" a sum substantially equivalent to or in excess of the aggregate value of the property. The defendant relies on FRB letter No. 1192, of June 15, 1977, reprinted at CCH Consumer Credit Guide ¶31,623, which states:

> [A] lease will be considered a "credit sale" only if it meets both of the following criteria. First, the lessee must be contractually obligated to pay, as compensation for use of the property or services leased, a sum substantially equivalent to or in excess of the aggregate value of the property or services involved. Secondly, it must be contractually agreed that the lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property. . . .
>
> It is the staff's opinion that the lease agreement in question does not fall within the definition of a "credit sale" because it does not meet the first requirement. . . We note that the lease agreement contains an express provision permitting termination of the lease agreement at anytime, by either party . . . Such termination by the lessee results in no penalty or additional cost being imposed on the lessee. Therefore, the lessee under the lease agreement discussed above has not contracted "to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property . . . involved."

In response to this argument, the plaintiffs contend that we must distinguish leases from "disguised credit sales". Plaintiffs further argue that FRB letters must be read in the light of prior commercial law in the area, specifically section 1-201(37) of the Uniform Commercial Code (UCC). The language referring to "lease" in the section of the Truth-in-Lending Act defining "credit sale," §1602(g), was taken from the UCC definition of "security interest" found in §1-201(37), and accompanying commentary. 1/ Relying on cases that have interpreted this UCC provision, plaintiffs argue that the instant transactions are "sales" within §1-201(37) of the UCC, because the plaintiffs acquired an equity interest in the televisions when their payments were credited toward the purchase price. See, e.g., In re Rover's Bakery, 1 UCC Rptg. Serv. 342, 345-46 (E.D. Pa. 1963). Therefore, plaintiffs argue that these transactions should fall within the coverage of the Truth-in-Lending Act. Plaintiffs also argue that the purchase option, in effect, forced the renter to choose between paying the entire sum or forfeiting all equity in the television.

As with the claims based on the "consumer lease" provisions, we find that dismissal of the alternative claim based on the "credit sale" provision is inappropriate at this time. Although bona fide leases are not covered by the Truth-in-Lending Act, leases which are actually disguised sales agreements, designed to evade regulation, do come within the Act. Green v. Arata Leasing Corp., No. C-75-0157 (N.D. Cal., Apr. 8, 1975). Through discovery, evidence may

1/ Warren and Larmore, Truth In Lending: Problems of Coverage, 24 Stan. L. Rev., 791, 804-05 (1972). These authors suggest, "It is doubtful that a court would allow Truth-in-Lending to be avoided by the simple stratagem of transforming an option to purchase for a nominal price into an option to renew at a nominal rental for the useful life of the property." Id. at 806.

surface which will show that these agreements actually allow for extended credit sales. Since discovery may assist in determining the validity of plaintiffs alternative claim, the motion to dismiss on the ground that these transactions are not credit sales is denied.

For all of the foregoing reasons, we enter the attached order denying defendant's motion to dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERNESTINE JONES AND HARRY JACKSON AND MAE JACKSON on behalf of themselves and all others similarly situated	:	CIVIL ACTION
vs.	:	
ACTION TV RENTAL, INC.	:	NO. 79-1535

ORDER

AND NOW, this 30th day of June, 1980, upon consideration of the motion to dismiss and memorandum in support thereof, as well as plaintiffs' opposition thereto, IT IS ORDERED that the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, J.

ENTERED: 6/30/80

CLERK OF COURT

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DONNA JEAN BURKS,

Plaintiff,

v.

CURTIS MATHES CENTERS, INC.,

Defendant.

Civil No. 4-79-429

MEMORANDUM OPINION AND ORDER

LODA RHINES,

Plaintiff,

v.

CURTIS MATHES CENTERS, INC.,

Defendant.

Civil No. 4-79-574

JEREMY LANE, Esq., Legal Aid Society, Minneapolis, Minnesota, appeared for plaintiffs.

BRUCE E. HANSON, Esq., Doherty, Rumble & Butler, St. Paul, Minnesota, appeared for defendant.

These are actions for money damages stemming out of agreements between the plaintiffs, Donna Jean Burks and Loda Rhines, and the defendant, Curtis Mathes Centers, Inc., a foreign corporation licensed to do business in Minnesota. The plaintiffs each allege that the defendant violated the Truth in Lending Act, 15 U.S.C. § 1501, et seq., and Federal Reserve Regulation Z, 12 C.F.R. § 226, in regard to their respective agreements. Jurisdiction is asserted under Section 130(e) of the Truth in Lending Act, 15 U.S.C. § 1604(e), and 28 U.S.C. § 1337. The defendant has moved to dismiss the actions for failure to state a claim.

Background

The defendant advertised a plan whereby customers could "rent to own" televisions. The advertisement stated that there were "no credit hassles," "no long term obligation," and that "all payments apply toward ownership." The plaintiffs responded to the

advertisement. In September, 1978, plaintiff Burks and defendant entered into a written agreement whereby plaintiff Burks rented a television on a week to week basis. In November, 1978, plaintiff Rhines and defendant entered into an agreement using the same form contract that was used for the agreement with plaintiff Burks.[1]

At the top of the form agreement in bold face type are the words "THIS IS A RENTAL AGREEMENT ONLY." Other terms of the agreement provide that (1) title remains at all times with the owner, (2) renter may terminate the agreement by return of the television to the owner, (3) renter is fully responsible for loss, theft, or destruction of the television, (4) owner may terminate the agreement upon failure of the renter to make payment when due or other breach, and (5) in the event renter renews the agreement for 77 or 78[2] successive one-week terms, renter becomes the owner.

Plaintiff Burks claims that the defendant violated the Truth in Lending Act when it failed to disclose that by making payments for 78 weeks, plaintiff would be paying almost 200 percent of the retail price of the television and finance charges at an annual rate of 90.689 percent. Plaintiff Rhines claims that the defendant violated the Truth in Lending Act when it failed to disclose that by making payments for 18 months, she would be paying approximately 150 percent of the retail price and finance charges at an annual rate of over 50 percent.

The defendant admits that such disclosures were not made but asserts that there were no violations of the Truth in Lending Act because the disclosures required by the Act do not apply to the transactions between the plaintiffs and defendant. Defendant maintains that disclosures are required only for consumer credit sales and that because the agreements between the parties here were merely for rental of televisions, and therefore leases rather than sales, no disclosures were required.

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[1]Although it is not clear, it appears that the agreement between plaintiff Rhines and defendant was on a monthly basis.

[2]The contract with plaintiff Burks provided for 77 weeks; the contract with plaintiff Rhines provided for 78 weeks.

Definition of Credit Sale

The Truth in Lending Act, 15 U.S.C. § 1601, et seq., and Federal Reserve Regulation Z, 12 C.F.R. § 226, require disclosure of finance charges in a credit sale. The crucial issue presented by the defendant's motions to dismiss is whether these transactions were credit sales within the meaning of the Act. If the transactions were credit sales, the court would have subject matter jurisdiction under Section 130(e) of the Truth in Lending Act, 15 U.S.C. § 1640(e),[3] and the motion to dismiss for failure to state a claim within the jurisdiction of the court must be denied. If the transactions were not credit sales, the Truth in Lending Act and Regulation Z do not apply, and the motion to dismiss must be granted.

Credit sale is defined in Section 103(g) of the Act:

> (g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

15 U.S.C. § 1602(g).

The staff of the Federal Reserve Board has interpreted this definition in several opinion letters which conclude that rental agreements terminable at any time by the consumer are not credit sales and thus not included in the Truth in Lending Act. See FRB Letter No. 750, CCH Consumer Credit Guide ¶ 31,069; FRB Letter No. 761, CCH Consumer Credit Guide ¶ 31,083; FRB Letter No. 1192, CCH Consumer Credit Guide ¶ 31,623. The authors of the

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[3] This provision states that any action under Section 130 of the Act, 15 U.S.C. § 1640, for failure to make disclosures may be brought in any United States District Court.

opinion letters reason that if the consumer can terminate the agreement at any time, the consumer has not "contract(ed) to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved . . . ." and the transaction cannot be a credit sale. Such interpretations by an agency, although entitled to deference, are not binding on a court. Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979); Griffith v. Superior Ford, 577 F.2d 455 (8th Cir. 1979).

Several courts have reached the same conclusion as that expressed in the staff opinion letters. See Smith v. ABC Rental Systems, No. 77-2733 (E.D. La. Aug. 11, 1978), aff'd, No. 78-3180 (5th Cir. June 5, 1980); Josephine Dorsey v. Curtis-Mathes Sales Company and Curtis-Mathes Centers, Inc., Civil No. 4-79-436 (D. Minn. Mar. 23, 1979); In re Colleen R. Turner, Bankruptcy No. 3-78-1135(D) (D. Minn. Mar. 19, 1979); Clark v. Aquarius TV Rental, Inc., No. CA 4-77-133 (N.D. Tex. Oct. 18, 1977); Boyd v. ABC Rental Systems, No. C-74-456-1(B) (W.D. Ky. Sept. 12, 1975).

Other courts, however, have refused to follow the conclusion of the FRB staff opinion letters and have held that transactions similar to the ones here are credit sales and thus within the Truth in Lending Act. In Johnson v. McNamara, Civil No. 11-78-328 (D. Conn. Apr. 12, 1979), the contract provided that the consumer would become the owner of the property upon making 104 consecutive payments. The court found that it was not dispositive that the consumer was not contractually obligated to make all 104 payments and held that the Truth in Lending Act applied: "For all practical purposes the 'rental relationship' established by this form contract is indistinguishable from a credit sale." Id. See also Jones v. Action TV Rental, Civil No. 79-1535 (E.D. Pa. June 30, 1980); Dodson v. Ramco Enterprises, Inc., Civil No. 79-1132-N (E.D. Va. Apr. 9, 1980); Waldron v. Best TV Stereo Rentals, Inc., Civil No. T-79-1105 (D. Md. Dec. 28, 1979).

The House Report accompanying the Truth in Lending Act stated that "the definition of credit sales is . . . limited to include leases only if they are, in essence, disguised sale arrangements." 1968 U.S. Code Cong. Adm. News 1980. In interpreting the Truth in Lending Act in a different situation, the Eighth Circuit noted with approval that "the majority of courts have focused on the substance, rather than the form of credit transactions, the course of dealing of the parties, and the intention of the parties in addition to specific contractual obligations." Joseph v. Norman's Health Club, Inc., 532 F.2d 85, 90 (8th Cir. 1976).

It is appropriate in this case to look beyond the form to the substance of the parties' agreements, but on the present state of the record it is impossible to determine whether the agreements were true leases or disguised sales arrangements. If, as the plaintiffs contend, the parties did view the agreement as a single agreement over an extended period (78 weeks for plaintiff Burks, 18 months for plaintiff Rhines), then the plaintiffs would have contracted to pay a "sum substantially equivalent to or in excess of the aggregate value of the property . . . ." and the transaction would be a credit sale. Facts that would be helpful to the court in making its determination include the percentage of customers in the "rent to own" program that actually become owners and the operation of the contractual clause regarding the customer's responsibilities for damage. Presently the matter is not ripe for decision.

The court having considered matters outside of the pleadings and finding that genuine issues of material fact exist and that defendants are not entitled at this time to summary judgment as a matter of law, defendant's motions must be denied.

ORDER

Accordingly, based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that defendant's motions to dismiss are denied.

Dated: November 18, 1980.

Diana E. Murphy
DIANA E. MURPHY
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALBERTA JOHNSON	:	
-vs-	:	Civil No. H-78-238
BRIAN McNAMARA, d/b/a TURNPIKE TELEVISION	:	
ROSE JOHNSON	:	
-vs-	:	Civil No. H-78-498
BRIAN McNAMARA, d/b/a TURNPIKE TELEVISION	:	

RULING ON MOTIONS FOR
SUMMARY JUDGMENT AND TO DISMISS

Both of these cases arise under Connecticut's Truth in Lending Act, Conn. Gen. Stat. § 36-393 et seq., and the federal Truth in Lending Act, 15 U.S.C. § 1667. The plaintiffs, who entered into separate contracts with the defendant for the rental of personal property for household use, move for summary judgment, arguing that the rental agreements executed by them are in fact disguised conditional sales and therefore the defendant should have made the disclosures required by the Truth in Lending Act. The defendant, on the other hand, moves to dismiss on the ground that the agreements are in fact true leases, and not subject to the Truth in Lending Act.

The legal relationship established by these rental contracts is precisely the same as if words of conditional sale had been used. Basically, the agreements permitted the lessees to purchase the property by paying rent over a two year period. The only possible distinction between this and a conditional sale is that under a rental agreement the lessees would not be liable for a deficiency judgment if they ceased paying rent. However, as will be discussed below, the Connecticut Retail Installment Sales Financing Act would prohibit a deficiency judgment in the circumstances present here, even if the contracts had been labelled conditional sales. The Court therefore finds that the rental agreements are indistinguishable from conditional sales contracts, and that they are therefore subject to the Truth in Lending Act. Consequently, the defendant's motions to dismiss the Truth in Lending Act counts are denied.

At trial the defendant may be able to establish that his failure to comply with the provisions of the Truth in Lending Act was the result of good faith reliance on the unofficial staff interpretations of the Act. Whether he has such a defense is a question of fact, which cannot be resolved on the present record; the plaintiffs' motions for summary judgment are accordingly denied. Since the transactions are subject to the Truth in Lending Act and because

the Truth in Lending and Truth in Leasing Acts are mutually exclusive, the defendant's motions to dismiss the Truth in Leasing Act counts of the two complaints are granted.

Jurisdiction

Due to the peculiarities of the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., this Court has subject matter jurisdiction over Truth in Lending counts, despite the fact that they involve only issues of state law. See Ives v. W. T. Grant Co., 522 F.2d 749, 756 (2d Cir. 1975); Solevo v. Aldens, Inc., 395 F.Supp. 861, 862 (D. Conn. 1975). Whether the state or federal act is applicable is of little consequence, in light of the state regulation providing that the state's act should be interpreted as synonomous with the federal Truth in Lending Act. Connecticut Banking Department Regulation § 36-395-11. Subject matter jurisdiction over the Truth in Leasing counts is expressly provided for in 15 U.S.C. § 1667d.

Statement of Facts

The two rental agreements at issue are identical form contracts prepared by the defendant, Brian McNamara, d/b/a Turnpike Television. On September 24, 1977 the plaintiff Rose Johnson executed a contract for the rental of a stereophonic

radio phonograph, at a weekly rental of $10.69. The plaintiff Alberta Johnson signed an agreement for the rental of a color television set on May 13, 1977, for a weekly rate of $14.97. With the exception of the items leased and the weekly rates, the contracts are identical. They provide that "The renter receives use and possession of the property for successive one-week terms so long as weekly rental payments are made." The contract may be terminated at any time by the renter, by returning the rented item to the owner and paying any accrued rent. The owner may terminate the lease and repossess the property, if the renter fails to make a scheduled weekly payment. The contract provides that the renter will become the owner of the property upon making 104 successive weekly payments. For all practical purposes, therefore, the "rental" relationship established by this form contract is indistinguishable from a credit sale, in which the creditor has agreed to sell the item to the debtor, the purchase price being payable over a two year period.

Discussion of the Law

The sole issue raised by the present motions is whether the transactions come within the Truth in Lending Act's definition of "credit sale;" if they do not, the defendant is

not required to make the Truth in Lending disclosures. That definition, which is identical to the federal Truth in Lending provision, 15 U.S.C. § 1602(g), is contained in Conn. Gen. Stat. § 36-393(f):

> "(f) 'Credit sale' refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract;"

The defendant has not contested the plaintiffs' assertion that the total amount to be paid over the two year period — $1,111.94 for the stereo and $1,556.88 for the television — was substantially equivalent to or in excess of the aggregate value of the property involved; and it is apparent from the terms of the contracts that the plaintiffs would become the owners of the property upon making the 104 weekly payments. The defendant argues, however, that because the contracts are terminable at will, by the plaintiffs, the latter have not contracted to pay as compensation for use a sum substantially equivalent to the value of the property involved. Therefore, the defendant concludes, the contracts do not come within the purview of § 36-393(f).

There is a paucity of authority on this issue. The defendant has not cited, nor has the Court located, any Circuit Court decisions on this issue. In support of his position the defendant cites five unpublished District Court decisions. Griggs v. East TV & Rental, Inc., No. C75-2509A (N.D. Ga. April 8, 1976); Terrell v. Mr. T's Rental, No. C75-2053A (N.D. Ga. June 4, 1976); Boyd v. ABC Rental Systems, No. C-74-456-L(B) (W.D. Ky. September 12, 1975); Clark v. Aquarius TV Rental, Inc., No. CA 4-77-133 (N.D. Tex. October 18, 1977); Smith v. ABC Rental Systems, No. 77-2733D (E.D. La. August 11, 1978). Each of these cases is factually indistinguishable from the present one, involving rental transactions which were terminable at the option of the lessee. In each case the court held that the transaction was not a credit sale, because the lessee had contracted to pay only the initial weekly or monthly payment and was therefore not obligated by the contract to pay a sum substantially equivalent to the value of the leased property.

However, in none of these five cases did the court undertake an analysis of the practical consequences of entering such a terminable lease. Rather these cases merely rely on several unofficial staff interpretation letters of the Federal Reserve Board, all holding that a lease terminable at the option of the lessee is not a credit sale, in spite of the fact that the lessee will become the owner of the

property upon making all rental payments. FRB Letter No. 750, CCH Consumer Credit Guide, ¶ 31,069 (Jan. 11, 1974); FRB Letter No. 761, CCH Consumer Credit Guide, ¶ 31,083 (March 12, 1974); FRB Letter No. 1192, CCH Consumer Credit Guide, ¶ 31, 623 (June 15, 1977).

It is axiomatic that administrative "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." United States v. Larionoff, 431 U.S. 864, 873 (1977). In terms of persuasiveness, unofficial staff interpretations stand at the bottom of the hierarchy of administrative rulings interpreting the Federal Truth in Lending Act, behind both official staff interpretations and interpretations of the Federal Reserve Board itself. Unofficial staff interpretations, which are relied on by the present defendant and by the cases he cites, are therefore not binding on this Court. See Grubb v. Oliver Enterprises, Inc., 358 F.Supp. 970, 973 n.6 (N.D. Ga. 1972).

The legislative history of 15 U.S.C. §1602(g) indicates that in defining credit sale, Congress intended to include those leases which "are, in essence, disguised sale arrangements." 1968 U.S. Code, Cong. & Admin. News 1962, 1980. In drawing the distinction between disguised sales and true leases, courts are to look to precedents in the commercial

law field:

> "The language covering disguised leases is nearly identical to the language used in the Uniform Conditional Sales Act and in many State retail installment sales acts to distinguish between 'true' leases and other leases." Senate Report No. 392, 90th Cong., 1st Sess., at p. 12-13 (June 29, 1967).

Connecticut law, which governs the instant transaction, has long held that it is the effect of the transaction, not the words employed, which determines the relationship between the parties. Thus, where it is apparent from the terms of the contract that the parties in fact contemplated a conditional sale, the Court will treat the transaction as such, even though the contract is labelled a "lease" and the installment payments are denominated "rent." Loomis v. Brace, 50 Conn. 228, 230 (1882); Hine v. Roberts, 48 Conn. 267, 270 (1880); Tishman Equipment Leasing, Inc. v. Levin, 152 Conn. 23, 28 (1964). In other words the Court "must ascertain the intention of the parties by looking at the effect of the terms of the agreement on the parties instead of by the convenient name the parties may have given to the agreement." Alban Tractor Co. v. State Tax Commission, 150 A.2d 456,459 (Md. 1959). See also Beckwith Machinery Co. v. Matthews, 57 A.2d 796, 801 (Md. 1948).

The clearest indication that a purported lease is in fact a conditional sale is a provision, like the one contained in the present defendant's form contract, that the

lessee will become the owner of the property upon making all the rental payments. As the commentary to § 1 of the Uniform Conditional Sales Act notes:

...

> "If the transaction were really a lease or bailment, naturally payments would give the so-called lessee no rights except to the use of the article, and he would be expected to return it to the lessor at the end of the lease instead of becoming automatically the owner thereof." Vol. 2A Uniform Laws Annotated at p. 22.

Similarly, in Loomis v. Brass, supra, the Connecticut Supreme Court held that "the fact that the piano was by contract to be the [lessee's] when the [full rent] should be paid, shows decisively that the monthly sums were to be paid, not as rent, but as the purchase price." 30 Conn. at 231. Accord Tishman Equipment Leasing, Inc. v. Levin, supra, 152 Conn. at 28; In re Herold Radio & Electronics Corp., 327 F.2d 564, 565 (2d Cir. 1964); In re Crown Cartridge Corp., 220 F.Supp. 914, 916 (S.D. N.Y. 1962); Park & Lacy Co. v. White River Lumber Co., 35 P. 442, 443 (Cal. 1894).

The fact that the present plaintiffs were not contractually obligated to make all 104 rental payments is not dispositive. A one month lease which could be renewed each month and which gave the lessee the option to purchase at any time, with the monthly rentals to be credited toward the purchase price, was held to be a conditional sale in Harry B. Loeb Piano Co. v. Kessler, 140 So. 398, 399 (La. 1932). Cases

construing the Uniform Commercial Code's definition of "security interest," which superseded the Uniform Conditional Sales Act, are also instructive. Where the lessee will take title to the property upon making all rental payments, the transaction is treated as a security interest. In the Matter of Oak Manufacturing Inc., CCH Consumer Credit Guide, Transfer Binder, ¶ 99,863. Thus where the contract permitted the lessee to cancel the lease after the first monthly payment, the court held that the lease was to be regarded as "a security instrument (conditional contract of sale)," because the lessee had an option to purchase and the rentals would be credited toward the purchase price. United Rental Equipment Co. v. Potts and Callahan Contracting Co., Inc., 231 Md. 552, 191 A.2d 570, 574 (1963). Other cases where a terminable lease was held to create a security interest include In re Rover's Bakery, Inc., 1 UCC Rep.Serv. 342 (E.D. Pa. 1963) and In re Dennis Mitchell Industries, Inc., 4 UCC Rep. Serv. 1082 (E.D. Pa. 1967).

An examination of the effect which these two rental agreements had on the relationship between the parties demonstrates that the leases cannot be distinguished from conditional sales. Because the plaintiffs have the option to become owners of the leased property by making 104 rental payments, the only conceivable difference between these transactions and the traditional conditional sales arrangement is

that under the rental contracts the plaintiffs could cancel their agreements without being subject to a deficiency judgment. However, the Connecticut Retail Installment Sales Financing Act would prohibit the collection of deficiency judgments in cases like the present ones. Conn. Gen. Stat. § 42-98(f). Therefore, the legal obligations between the parties under the present contracts are precisely the same as they would have been if the plaintiffs had unequivocally agreed to purchase the property and pay the purchase price in weekly installments over a two year period. Given this circumstance, a holding that these contracts are not subject to the Truth in Lending Act because they are phrased in terms of a lease rather than in terms of a conditional sale would represent a supreme exaltation of form over substance. The Court therefore holds that the present contracts constitute "credit sales" within the meaning of Conn. Gen. Stat. § 36-393(f), and denies the defendant's motions to dismiss the Truth in Lending counts.[2/]

This conclusion does not dictate the granting of a summary judgment in the plaintiffs' favor, however. Although it has not been raised by the defendant, he may have a defense to civil liability based upon 15 U.S.C. § 1640(f). That section provides:

> "(f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in

> conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason."

Prior to the 1976 amendment, a good faith reliance on the unofficial staff interpretation letters would not have provided a defense to civil liability. See Ives v. W. T. Grant Co., 522 F.2d 749, 758 (2d Cir. 1975). However, with the 1976 amendment to the Truth in Lending Act the defendant can avoid liability by proving that its failure to make the required Truth in Lending disclosures was the result of good faith reliance on the aforementioned unofficial staff interpretations, even though the Court has ruled here, that those interpretations are not an accurate reading of the Act in the circumstances present here. 2/ Charles v. Krauss Co., Ltd., 572 F.2d 544,549 n.4 (5th Cir. 1978). Whether the defendant did in fact raly on those staff interpretations is a question of fact, which cannot be resolved on a motion for summary judgment. Jones v. Community Loan & Inv. Corp., 544 F.2d 1228, 1232 (5th Cir. 1976), cert. den. 431 U.S. 934 (1977). Accordingly, the plaintiffs' motions for summary judgment are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 12th day of April, 1979.

T. Emmet Clarie
Chief Judge

FOOTNOTES

1/ That statute provides:

> "(f) Deficiency on resale. Notwithstanding that the proceeds of the resale are not sufficient to defray the actual and reasonable expenses thereof, and also such actual and reasonable expenses of any retaking and storing of such goods and the balance due under the contract, the holder of the contract may not recover the deficiency from the retail buyer or any surety or guarantor for him, or from any one who has succeeded to the obligations of such retail buyer, except as provided in subsection (g) of this section."

2/ This conclusion requires that the Court dismiss the Truth in Leasing counts. The Truth in Leasing Act expressly excludes from its coverage "any credit sale as defined in section 1602(g) of this title." 15 U.S.C. § 1667(1). Because the Court has ruled that the present transactions are credit sales within the meaning of the Truth in Lending Act, the Truth in Leasing Act is by its express terms inapplicable.

3/ Crucial to the Court's holding that the present contracts are subject to the Truth in Lending Act is the fact that Connecticut law would prohibit a deficiency judgment in the circumstances present here, even if the agreements were phrased in terms of conditional sale. The Court therefore has no need to rule on the question of whether the unofficial staff interpretations reflect an accurate reading of the Truth in Lending Act in a jurisdiction where such a deficiency judgment may be assessed against the defaulting conditional buyer. Similarly, the Court has no occasion to rule on whether the present ruling would apply to an automobile lease, given the fact that Connecticut permits the conditional seller of an automobile to recoup a deficiency judgment in certain circumstances. See Conn. Gen. Stat. § 42-98(g).

Des Moines, Iowa, Saturday, August 15, 1981 — One Section

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Rental TVs: Costly 'rip-off' or needed service?

By Susan Caba

Some Des Moines residents — many of them poor — are buying television sets on easy-credit, rent-with-option-to-buy plans that end up costing about twice the price of comparable sets sold in department stores.

For example, a 25-inch Magnavox color cabinet model is priced at $700 at Younkers, and was marked down recently to $600 for a sale. The price of a similar set, purchased over 18 months from a local rental agency, is $75 a month — $1,350 during the life of the contract.

The rental plans are aimed at poor people, or those who don't have enough credit history to obtain a loan to buy a television outright. While some critics call the rental plans "easy-credit rip-offs" that take advantage of the poor, those who provide the sets insist they offer a valuable service to people who otherwise could not afford a television.

Kathryn Graf, Iowa assistant attorney general in the consumer protection division, recently saw a couple who paid $39.95 a month for 13 months — about $520 — to rent a set they hoped to buy. The set turned out to be six years old.

"Economically, renting is not the best way to go," she said. "You could probably buy a set like (the one the couple was renting) for $100, if you shopped the want ads."

The attorney general's office has not had "any significant volume" of complaints about rental agencies, said Assistant Attorney General Douglas Carlson.

There always have been companies that rent appliances with options to buy in Des Moines, said Carlson, but he thinks that recently such companies are meeting with more success.

"The economic situation and tight credit has made this business a little more lucrative," he said.

Renting appliances is attractive to people who can't get credit or who don't want to list a lot of debt on financial statements. They may be applying for large loans, such as home mortgages, and want to present a debt-free credit picture.

A disproportionate number of customers at stores such as Colortyme Rentals, 1554 E. Euclid Ave., are poor. But the managers of such stores say they see nothing unethical about the fact that poor people, because they may not have good credit, are paying much higher prices than citizens who have cash or good credit ratings.

"So what's wrong with that?" countered Colortyme manager Scott Dimitt, agreeing that he seeks to serve the poor segment of the population. "There are a lot of people who can't go out and buy with cash."

At Colortyme, a Rutherford color television-stereo console rents for $25 a week or $95 a month — for a cost of $1,710 over 18 months. The suggested retail price for a similar set made by Philco is $1,295, although the Philco distributer said dealers rarely charge that much for the sets.

Dimitt's comment was repeated, with variations, by other rental Color —

Please turn to Page Two

Color —

Continued from Page One

company employees. Lee Fleischhacker, manager of the Curtis Mathes store at 1301 E. Euclid Ave., said he serves people who "credit companies aren't going to touch." Even if his customers could obtain consumer loans, they probably would pay as much as 36 percent interest, he said.

At Curtis Mathes, the top-of-the-line entertainment television-stereo console rents for $34.73 a week or $92.79 a month — that's $2,224.80 over the 24 months of the rental agreement. A comparable set, said Fleischhacker, would sell for about $1,700, although entertainment centers range from $1,500 to $2,900.

Sixty percent of the customers at Right and Sound Rent-A-Center, 2211 Rickman Road, "get ADC (Aid to Dependent Children) payments or Social Security checks or some sort of welfare ... and we know that," said employee Dean Corder.

The Rutherford or Philco television-stereo consoles at Rent-A-Center rent for $21.95 a week or $74.95 a month — over 18 months, a customer would pay $1,349.10. The Philco set list price is $1,295.

In a typical transaction, a customer calls or visits the rental store. He or she is asked to provide information that may include the name of the customer's landlord, employer, former employers, supervisor, weekly income, any housemates and their incomes, and names and addresses of friends and relatives.

This information is verified with phone calls and, in many cases, the customer has the rental television (or stereo, freezer or refrigerator) at home within an hour of contacting the store. The merchandise is carried into the home as soon as the customer signs a rental agreement.

If the companies are quick to deliver, they are also quick to react if a payment is more than a day overdue. Rental is either by the month or the week, with monthly rates slightly lower than the total of four weekly fees.

Three days after an unpaid bill is due, company representatives are on the telephone asking for payment. By the seventh day, they're at the door asking either for money or for the rental property.

Lucille Williams, 913 Day St., got so frustrated with "the hassles" of renting a television from Rent-A-Center that she returned the set after about four months.

When her payments were even a day late, said Williams, she was charged a $5 reinstatement fee. Sometimes, when her weekly $15.50 payment was due on a Saturday, a Rent-A-Center employee would call the house on Saturday to make sure Williams was planning to bring the money to the store.

And when the set broke down, Williams said she "had to beg 'em" to bring a substitute set as the rental agreement stated they would. She's planning to save money for a down payment on a similar set at a department store, so she can put it on lay-away and have it paid for within 90 days. She expects to pay about $800 for a set.

Ernestine Love, 826 Oakridge Drive, has been renting a set for $22 a month from Colortyme for nearly a year. She asked the total price when she began renting, but the store employee told her "they didn't figure the price that way, they go by the monthly bill."

Although she now realizes she probably could have bought a television for less than she has paid in rent, Love is looking forward to her last payment next May.

Colortyme calls her each month several days before her payment is due, said Love, "to remind" her about her bill. Once she called before the due date to say she would be a day late with the bill. She was told, she said, that a store employee would have to come and get the television.

"I don't like (repossessing)," said Rent-A-Center's Corder. "I've had ladies cry, especially if it's a refrigerator. But lots of times, that's what it takes to get a person to come in and pay."

Ownership of the television or other property does not pass to the renter until the final payment is made. Most televisions are rented on an 18-month basis, with the payments applied toward purchase. Even if the renter has made 17 payments on a television, for example, the store still owns the set.

And rental agreements from some of the stores include a clause that allows company employees to "enter and take possession" of the set.

The clause allows the owners to enter "peacefully," said Graf, not against the will of the person renting the set. Dimitt, of Colortyme, said the clause doesn't mean he could enter a house and take away a rental set.

Another clause in some of the rental agreements also is controversial, said Graf. Both the Curtis Mathes and Colortyme agreements stipulate that the television "is not represented to be new or unused."

Representatives at both stores said they could provide a new set if the customer asked for one. However, Graf said they would not be obligated to provide a new set even if they told the customer they would do so.

Colortyme's rental agreement also stipulates that statements or agreements made by store employees are not binding unless they are written into the contract.

Dimitt said he will hold a repossessed set for 30 days, and give the renter credit for past payments if the renter makes up a missed payment during that time. However, this stipulation is not in the written agreement.

Although the merchants agreed that most of their customers begin renting with the intention to buy a television, often they can't keep up with the payments and return the set. Their accumulated payments are lost.

"Returns happen quite frequently," said Dimitt. "There are a lot of good people who have rented from us (who couldn't make the payments). Fortunately, the contract isn't a long-term obligation."

"Most of (our customers) can't budget their money very well," said Corder of Rent-A-Center. "But most of them that keep a set for the first six months, they're going to keep it the whole time."

Carlson of the attorney general's office predicts that rentals of televisions and other appliances will continue to increase as long as the economy remains in the doldrums.

And the Wall Street Journal recently reported that television rentals were increasing in the United States. Some people rent, noted the newspaper, because they can't get credit. But others rent because they like to have the latest models in their homes.

Carlson said others rent because they are planning to move shortly and don't want the expense of moving a large television.

All the local merchants agreed their customers could buy a new television for a fraction of the rental cost. But that would mean doing without a set for a while.

"A television, especially if you can't afford to take the kids out for a movie, can really become an entertainment center for people," said Carlson. "That's why this merchandise is always in demand, even if people are really strapped."

"A lot of people can't get credit right now," said Fleischhacker. "This is something they can enjoy and end up owning. It's real hard to live without a T.V.."

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No. 82-996

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE RENT-IT CORPORATION,
Petitioner,

v.

WILLIAM CLARK,
Respondent.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF RESPONDENT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ANTHONY J. TOUBCHNER
Legal Aid Society of Polk County
102 East Grand Avenue
Des Moines, Iowa 50309
(515) 243-3306
Attorney for Respondent
and Counsel of Record

1/

Now comes the Respondent, William Clark, and moves this Honorable Court for leave to proceed in forma pauperis, pursuant to Rule 46, for the reason that he is financially unable to pay the costs of this proceeding or to pay the printing costs of documents to be filed, as shown by his accompanying Affidavit, and that he believes the judgment of the United States Court of Appeals for the Eighth Circuit is free of error and need not be reviewed. Leave to so proceed was granted in both Courts below.

Anthony Touschner

ANTHONY J. TOUSCHNER
Attorney for Respondent,
William Clark
102 East Grand Avenue
Des Moines, Iowa 50309
(515) 243-3306

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 1983, a copy of the foregoing Motion of Respondent for Leave to Proceed in Forma Pauperis was sent by first class mail, postage prepaid to:

J. Samuel Choate, Jr.
Attorney at Law
505 First National Bank Building
801 Broad Street
Augusta, Georgia 30903

Anthony Touschner

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE RENT-IT CORPORATION,
Petitioner,

v.

WILLIAM CLARK,
Respondent.

AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF IOWA)
) ss.
COUNTY OF POLK)

I, William Clark, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that the Judgment of the lower court is free from error, and not in need of review.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending the judgment below are true.

1) I am presently unemployed. I was laid off from my job as a truck driver on November 11, 1982 at Des Moines Asphalt Co. My wife and I have no present income. I received $407.20 gross pay per week at that job.

2) I received no other income from any other source in the past twelve months, except unemployment pay.

3) I have no cash, nor checking or savings account.

4) I own no real estate, stocks, bonds, nor notes. I own a 1970 Ford station wagon valued at $400.00. I own a 1979 Colby, outdoor, 16 ft. motor boat valued at $700.00.

5) The following persons are dependent upon me fo. their support:

Vickie Clark - wife

Kevin Hendricks - stepson (age 11)

Jay Clark -son (age 16)

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

William M Clark
WILLIAM CLARK

SUBSCRIBED and SWORN to before me this 22 day of January, 1983.

Betty J. Queen
NOTARY PUBLIC in and for the State of Iowa

Let the Applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE